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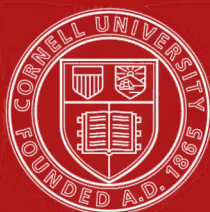
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Federal equity procedure :a treatise on



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FEDERAL EQUITY PROCEDURE

A TREATISE

ON THE PROCEDURE IN

SUITS IN EQUITY

IN THE

CIRCUIT COURTS OF THE UNITED STATES

INCLUDING

APPEALS AND APPELLATE PROCEDURE

WITH APPENDIXES

CONTAINING THE CONSTITUTION OF THE UNITED
STATES ANNOTATED, FEDERAL JUDICIARY
ACTS, COURT RULES, EQUITY FORMS,
ENGLISH ORDERS IN CHANCERY

BY

C. L. BATES

OF THE BAR OF SAN ANTONIO, TEXAS

IN TWO VOLUMES

VOLUME I.

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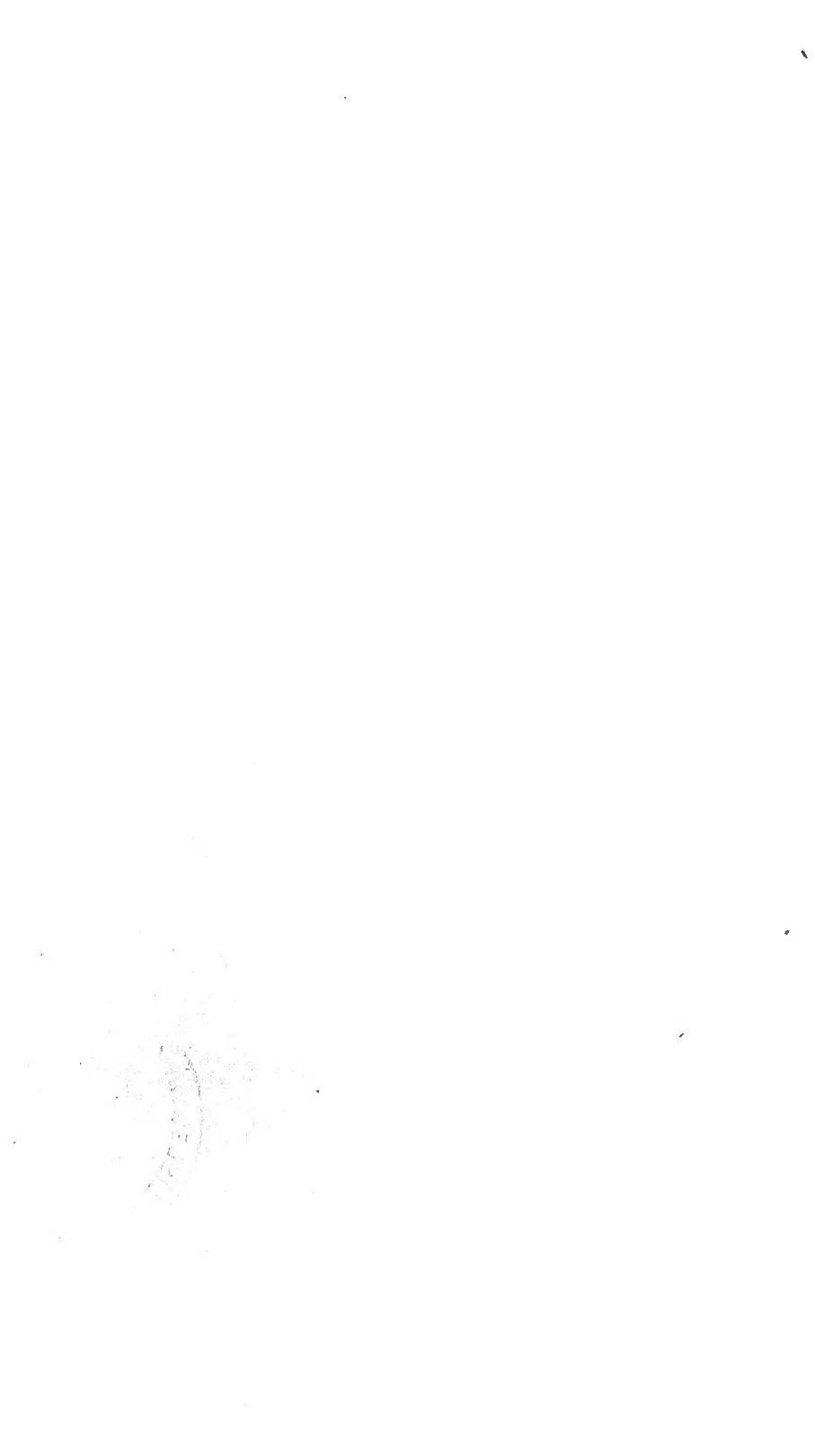
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I DEDICATE THIS BOOK — THE RESULT OF
TEN YEARS' UNREMITTING LABOR — TO MY WIFE,
MRS. BELLE STRICKLAND BATES,
WITHOUT WHOSE UNFAILING SYMPATHY AND INSPIRING COMPANION-
SHIP AND AID ITS COMPLETION WOULD NOT HAVE BEEN POSSIBLE,
NOR THE DEGREE OF ITS EXCELLENCE SUCH AS IT IS. IT
IS MEET THAT IT SHOULD GO TO THE WORLD WITH
THE BENEDICTION OF HER NAME UPON IT.



PREFACE.

This work has been written in response to a demand for a treatise containing a full and systematic statement of the procedure in suits in equity in the circuit courts of the United States. During the last twenty-five years, the really great and important property litigation in this country has been chiefly in suits in equity in the federal courts, and such litigation is likely to increase with the progress of the country. The procedure in such suits is the same in all the states of the Union, not controlled by procedure in the state courts, but materially variant from it; and the busy lawyer, practicing in both state and federal courts, has often felt the need of a work furnishing readily a complete and comprehensive statement of the rules of procedure in suits in federal equity. The aim of the author has been to state fully the procedure in the prosecution and defense of a suit in federal equity, with all its incidents and minor details, from the preparation and filing of the bill to and including the final decree, and appeal and appellate procedure. The successive steps in the progress of the suit, and the various rules of procedure applicable to them, have been stated in their due order and sequence. The book has been written throughout upon the principle laid down in United States equity rule ninety. Wherever any question of procedure is covered by a federal statute or an equity rule promulgated by the supreme court, such statute or rule is quoted or cited as conclusive of the question. When there is no such statute or rule of court, the English chancery procedure as it existed in 1842, when the United States equity rules were adopted, is stated. Mitford's Equity Pleading, cited as "Redesdale," the second edition of Smith's Chancery Practice, and the first London edition of Daniell's Chancery Pleading and Practice are cited and frequently quoted, as stating the English chancery procedure adopted in the federal courts. No edition of Daniell, except the first London edition, is cited or in any way referred

to in this work; that edition, with the second edition of Smith, having been designated by the United States supreme court as containing a statement of the English chancery procedure adopted in the federal courts. For convenience, appendixes have been added, containing the federal constitution annotated, the original judiciary act, the judiciary acts now in force, the various court rules promulgated by the supreme court, also some forms in equity, and the English orders in chancery which form part of the English chancery procedure adopted in the federal courts. There is a general index to the text, and the constitution, judiciary acts, court rules and forms are separately indexed.

The work is respectfully submitted to the bench and bar, whose ultimate judgment in such matters is generally just and correct; and if it shall, to any appreciable extent, receive their kindly recognition, the author will esteem it as a rich reward for his labor and care.

C. L. BATES.

SAN ANTONIO, TEXAS,

August 12, 1901.

TABLE OF CONTENTS.

VOLUME I.

CHAPTER I.

BASIS OF THE EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES.

	<i>Page.</i>
§ 1. Introductory.....	1
2. Creation of the federal judiciary.....	3
3. Constitutional grant of judicial power.....	3
4. Statutory grants of jurisdiction.....	4
5. Original jurisdiction of the circuit courts of the United States	5
6. Same — Jurisdiction under the bankruptcy act.....	9
7. Sources of the equity jurisdiction of the circuit courts of the United States.....	10
8. The system of equity jurisdiction and jurisprudence adminis- tered by the circuit courts.....	10
9. Same — Rules of decision same in all the states.....	11
10. Adequate remedy at law... ..	12
11. The jurisdiction must appear upon the face of the record....	13

CHAPTER II.

SYSTEM AND SOURCES OF EQUITY PROCEDURE ADMINISTERED IN THE CIRCUIT COURTS OF THE UNITED STATES.

12. Statutes adopting and regulating equity procedure in the United States circuit courts.....	15
13. Supreme court authorized by statute to make equity rules... ..	16
14. First equity rules promulgated by the supreme court.....	16
15. Same — Rules now in force.....	17
16. Procedure of the High Court of Chancery in England adopted	17
17. Same — Explanation of equity rule 90 by the supreme court..	17
18. Same — Orders of the High Court of Chancery in England... ..	18
19. Circuit courts may make equity rules.....	19
20. Equity procedure same in all the states.....	19
21. Authorities upon equity procedure in the circuit courts.....	20
22. Same — Chancellor Kent's opinions.....	21
23. Ancient English equity pleading.....	21
24. The matured English equity pleading.....	23

CHAPTER III.

INTERLOCUTORY PROCEDURE BEFORE THE CLERK AT RULES
AND BEFORE THE JUDGES AT CHAMBERS.

	<i>Page.</i>
§ 25. Circuit courts as courts of equity always open.....	26
26. The clerk to hold monthly rules and grant certain orders and proceedings	27
27. Orders by the judges at chambers and at rules.....	28
28. The order book	30
29. Same — Notice.....	31
30. Policy and method of the interlocutory procedure	31
31. Same — When pleadings are to be filed	32
32. Same — When exceptions to pleadings for scandal and impertinence are to be filed.....	33
33. Same — When exceptions to answers for insufficiency are to be filed	34
34. Default of parties to interlocutory procedure	35
35. Interlocutory procedure upon removal.....	36
36. Purposes of the first, second and third chapters.....	36

CHAPTER IV.

PARTIES.

37. Parties the first consideration	38
38. Difficulties in stating a rule for all cases.....	39
39. General rule as to parties	40
40. Both the legal and equitable titles should be before the court	42
41. Inconsistent titles not to be joined.....	43
42. Principles upon which courts of equity act in deciding upon parties.....	43
43. Classification of parties by the United States supreme court..	45
44. Persons out of the jurisdiction of the court	47
45. Same — Pleading.....	48
46. Parties out of the jurisdiction in ancillary suits.....	48
47. Absent parties to suits <i>in rem</i>	50
48. Same — Procedure to bring in absent parties	51
49. Trustees and beneficiaries	53
50. Same — Executors and administrators	54
51. Parties to suits for the administration of assets	55
52. Foreign executors and administrators	56
53. Suit to execute trusts of a will.....	57
54. Suits by testamentary trustees.....	58
55. Parties to railroad foreclosure suits.....	59
56. Suits in equity by stockholders.....	61
57. Suits against corporations — Who to defend — Intervening stockholders.....	63
58. Same — Officers made defendants for discovery.....	67
59. Parties to ordinary foreclosure suits.....	67

	<i>Page.</i>
§ 60. Parties to bills to redeem.....	69
61. Class suits — Numerous parties.....	70
62. Parties where real property is subject to successive estate....	70
63. Nominal parties.....	71
64. Parties jointly and severally liable.....	71
65. Objection for want of parties, when and how raised.....	72
66. Same — Objection at the hearing.....	73
67. Parties under disabilities — Infants, idiots, lunatics and married women.....	73

CHAPTER V.

PLACE OF BRINGING SUIT — TERRITORIAL JURISDICTION.

(a) GENERAL PRINCIPLES.

68. Definition of jurisdiction.....	75
69. Civil and common-law classification of actions — Local and transitory actions — Real, personal and mixed actions.....	76
70. Title to real estate controlled by the <i>lex loci rei sitæ</i>	79
71. Suits for the recovery of, or for damage to, real property, local	80
72. Same — Trespass <i>quare clausum fregit</i>	80
73. The distinction between local and transitory actions preserved in federal procedure.....	81
74. Same — Ruling in <i>Doulson v. Matthews</i> approved by the United States supreme court.....	87
75. Suits in equity are either local or transitory.	89
76. Same — Railroad foreclosure suits.....	89
77. Distinction between local and transitory actions not affected by federal procedure act.....	90

(b) HISTORY OF FEDERAL LEGISLATION ON TERRITORIAL JURISDICTION.

78. Territorial jurisdiction controlled by federal legislation — Act of September 24, 1789.....	91
79. Same — Act of May 4, 1858.....	92
80. Same — Act of June 1, 1872.....	93
81. Same — United States Revised Statutes of 1878.....	93
82. Same — Act of March 3, 1875 ...	95
83. Same — Acts of March 3, 1887, and August 13, 1888.....	96

(c) THE PRESENT STATE OF THE LAW.

84. General statutes in force in relation to territorial jurisdiction	98
85. Same — <i>Quære</i> : Has section 740, United States Revised Statutes, been repealed?	98
86. The place of beginning suit — The general rule.....	99
87. Same — When jurisdiction is based on diverse citizenship....	99
88. Same — Suits against domestic corporations.....	100
89. Same — Suits against railroad corporations.....	101
90. Same — Suits against national banking associations.....	102
91. Same — Suits against aliens and foreign corporations	103
92. Same — Suits arising under patent laws of the United States.	104

	<i>Page.</i>
§ 93. Same—Suits arising under the trade-mark laws of the United States.....	105
94. Same—Suits under laws of the United States to protect commerce.....	106
95. Same—Persons suing or sued in a representative capacity...	106
96. Local suits under section 8, act of March 3, 1875.....	107
97. Where ancillary or dependent suits are to be brought.....	108
98. The right to be sued in a particular district waived by general appearance.....	110

CHAPTER VI.

SUITS IN EQUITY COMMENCED BY ORIGINAL BILL.

99. How suit in equity commenced.....	113
100. The preparation of the original bill.....	114

(a) PARTS AND FRAME OF THE ORIGINAL BILL AS MATURED IN THE HIGH COURT OF CHANCERY OF ENGLAND.

101. Office and functions of the original bill.....	115
102. The address of the bill.....	116
103. Names and addresses of the plaintiffs.....	116
104. The stating part of the bill.....	116
105. The common confederacy clause.....	117
106. The charging part.....	117
107. The jurisdictional clause.....	119
108. The interrogating clause.....	119
109. The prayer for relief.....	120
110. The prayer for process.....	120

(b) PARTS AND FRAME OF THE ORIGINAL BILL UNDER THE UNITED STATES EQUITY RULES.

111. Nature and effect of the United States equity rules.....	120
112. What parts of the bill may be omitted.....	121
113. Address to the court and residence of the parties.....	121
114. The stating part and charging part of the bill partially blended	122
115. The stating part and charging part of the bill not wholly blended.....	122
116. The interrogating part of the bill.....	123
117. Same—Interrogatories not necessary to compel full answer..	124
118. Same—Plaintiff's right to discovery.....	125
119. Exceptions to the rule that plaintiff is entitled to discovery..	136
120. The prayer for relief and for special writs and orders.....	141
121. The prayer for the process of subpoena.....	141
122. The bill must be signed by counsel.....	142
123. What bills must be verified by oath....	142
124. How oaths are to be administered.....	143

(c) SOME GENERAL RULES OF PLEADING.

	<i>Page.</i>
§ 125. The jurisdictional facts must be averred in the bill.....	144
126. How and when jurisdictional facts are to be averred in removal cases.....	147
127. Every fact essential to plaintiff's right must be stated in the bill.....	147
128. Common-law rules of pleading followed in equity pleading...	150
129. Same — Pleading title to real property.....	151
130. Same — Conditions precedent must be averred in the bill....	159
131. Deeds, contracts and other instruments must be pleaded according to their legal effect.....	165
132. The bill must not contain scandal nor impertinence.....	165
133. Same — Inherent power of the court over its own records....	167
134. The bill must not be multifarious.....	167
135. Same — Common point of litigation.....	169
136. Same — No universal rule can be laid down.....	170
137. Same — Bill with a double aspect.....	171
138. The degree of certainty required in a bill in equity.....	172
139. Bills by stockholders....	173

(d) AMENDING THE ORIGINAL BILL.

140. The original and amended bills are one record	174
141. The general purposes of amendments ...	175
142. The federal statute of amendments and jeofails	176
143. Same — Time within which amendments may be allowed....	177
144. Amendments of course before demurrer, plea or answer filed..	178
145. Amendments after demurrer, plea or answer filed	179
146. Amendments after demurrer or plea allowed	179
147. Amendment after replication filed	180
148. Same — Form of averment in bill stating pretense of defendant.....	182
149. Amendments to put in issue new matter contained in defendant's plea or answer.....	182
150. What matter may be introduced by amendment.....	185
151. Amendment as to parties.....	186
152. When application for amending bills may be presented	187
153. How amendments are made.....	188

CHAPTER VII.

FILING THE ORIGINAL BILL — ISSUING AND SERVICE OF SUBPOENA — APPEARANCE OF DEFENDANT.

§ 154. Filing the original bill	189
155. Issuing the subpoena.....	190
156. Service of the subpoena — By whom served.....	191
157. Substituted service in ancillary suits	193
158. Service on non-resident defendants in suits <i>in rem</i>	194
159. Exemptions from service of subpoenas.....	196

	<i>Page.</i>
§ 160. Return of the subpoena.....	198
161. When defendant must enter his appearance	198
162. General and special appearances	199

CHAPTER VIII.

TAKING THE BILL PRO CONFESSO.

§ 163. Definition of decree <i>pro confesso</i>	203
164. Origin and history of the proceeding	203
165. The present practice of taking the bill <i>pro confesso</i>	206
166. The effect of taking the bill <i>pro confesso</i>	209
167. When a final decree <i>pro confesso</i> may be entered	210
168. Same — Striking out answer for contempt of judicial orders..	213
169. Against whom the bill may be taken as confessed.....	222
170. Opening orders and decrees <i>pro confesso</i>	224
171. Rights of defendant after decree <i>pro confesso</i> against him....	225

CHAPTER IX.

MANNER IN WHICH A SUIT MAY BE DEFENDED.

172. The defenses to a bill, and the order in which they are made.	227
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CHAPTER X.

FILING EXCEPTIONS TO THE BILL FOR SCANDAL AND IMPERTINENCE.

173. Objections for scandal and impertinence, how taken.....	229
174. When exceptions for scandal and impertinence must be filed.	229
175. Filing exceptions and procedure thereon.....	230
176. Principles which control in deciding upon exceptions for scandal and impertinence	232

CHAPTER XI.

DEMURRERS.

177. The time allowed defendant to file his defense to the bill.....	235
178. Demurrer in equity borrowed from the common law.....	235
179. Lord Redesdale's definition of a demurrer to a bill in equity..	237
180. Classification of demurrers to relief by Lord Redesdale.....	237
181. Another classification of demurrers to relief.....	238
182. Same — Demurrers to the jurisdiction	238
183. Same — Demurrers to the person of plaintiff.....	238
184. Same — Demurrers to the substance of the bill.....	239
185. Same — Demurrers to the form of the bill	239
186. Demurrer that the subject is not appropriate for the exercise of judicial power.....	240

	<i>Page.</i>
§ 187. Same subject continued.....	243
188. Demurrer that the subject of the suit is not within the jurisdiction of a court of equity.....	245
189. Same—Lord Redesdale's summary of the equitable jurisdiction.....	247
190. Demurrer that some other court of equity has the proper jurisdiction.....	248
191. Demurrer for want of federal jurisdiction.....	251
192. Demurrer that the plaintiff has no title to the character in which he sues.....	252
193. Demurrer for incapacity of plaintiff to sue alone.....	253
194. Demurrer for defect of parties.....	255
195. Demurrer for multifariousness.....	257
196. Demurrer for laches.....	257
197. Demurrer based on the statute of limitations.....	260
198. Demurrer based on the statute of frauds.....	264
199. Classification of demurrers to discovery.....	266
200. Consequences of not demurring to discovery.....	267
201. Demurrer to bills not original.....	268
202. General and special demurrers.....	270
203. Same—In equity must express the causes.....	272
204. Demurrer <i>ore tenus</i>	273
205. Statement of the extent of the demurrer.....	274
206. A demurrer bad in part is bad in whole ..	275
207. Demurrer and answer to the same matter.....	276
208. Demurrer too restricted.....	277
209. Admissions made by the demurrer.....	278
210. Speaking demurrers.....	278
211. Form of demurrer.....	279
212. Certificate of counsel and affidavit of defendant.	280
213. Filing, setting down and hearing demurrers.....	280
214. Effect of allowing a demurrer.....	281
215. Effect of overruling a demurrer.....	282
216. No demurrers in equity to answer and pleas.....	283

CHAPTER XII.

PLEAS.

217. Pleas in equity derived from the common law.....	285
218. The general nature and classification of pleas at common law.....	286
219. Pleas in bar at common law.....	287
220. Singleness or unity of issue at common law.....	287
221. General classification of pleas in equity....	289
222. The proper office of a plea in equity.....	289
223. Same—Singleness and materiality of issue.....	291
224. Pleading several pleas to different parts of the same bill.....	292
225. Several pleas by leave of court.....	292
226. What constitutes duplicity in a plea in equity.....	293

	<i>Page.</i>
§ 227. Frame of plea determined by form of bill.....	294
228. Pleas classified according to their form.....	296
229. The necessary averments of a plea.....	301
230. Statement of the extent of a plea.....	302
231. Plea bad in part and good in part.....	303
232. Answer in support of plea.....	304
233. Same — When required.....	306
234. Same — Equity rule.....	308
235. Same — Discovery of documents.....	308
236. Test of the sufficiency of answer in support of plea.....	308
237. Answer in support of plea evidence for defendant.....	309
238. Answer <i>in subsidium</i> of a plea.....	309
239. Jurisdictional objection in equity should be taken by special plea.....	310
240. Definition of pleas to the jurisdiction.....	311
241. Classification of pleas to the jurisdiction.....	312
242. Plea that the subject-matter of the suit is not within the ju- risdiction of a court of equity.....	313
243. Plea of personal privilege.....	314
244. Plea denying that jurisdictional amount is in dispute..	315
245. Plea denying diversity of citizenship.....	317
246. Plea to jurisdiction in suits by consignees.....	318
247. When jurisdictional objection may be raised under the act of 1875.....	318
248. Reason and policy of the statute.....	319
249. Procedure under the act of 1875.....	319
250. Same — Formal plea to the jurisdiction the simplest method.	321
251. Discretion of the court is judicial and subject to review.....	322
252. Burden of proof upon the issue of jurisdiction.....	322
253. Presumptions in favor of the jurisdiction of courts.....	323
254. Pleas in abatement — Definition.....	323
255. Classification of pleas in abatement.....	324
256. Classification of pleas to the person of the plaintiff.....	324
257. Classification of pleas to the person of the defendant.....	324
258. Classification of pleas to the bill.....	325
259. Plea that plaintiff does not possess the character in which he sues.....	325
260. Plea that defendant does not sustain the character in which he is sued.....	325
261. Plea of bankruptcy.....	325
262. Plea of another suit pending.....	326
263. Reason for the rule that suit pending is pleadable in abate- ment of a second suit.....	329
264. Requisites of a plea of <i>lis pendens</i>	330
265. Procedure when plaintiff sues both at law and in equity.....	331
266. Plea of want of parties.....	332
267. Pleas in bar — Definition.....	332
268. General classification of pleas in bar.....	333

	<i>Page.</i>
§ 269. Classification of pleas of statutes.....	333
270. Classification of pleas of matter of record.....	333
271. Classification of pleas of matter <i>in pais</i>	333
272. Classification of negative pleas.....	334
273. Plea of the statute of limitations.....	334
274. Necessary averments of a plea of the statute of limitations... ..	335
275. Plea of laches.	336
276. Plea of the statute of frauds.....	336
277. Plea of any other statute.....	337
278. Plea of a decree in equity.....	338
279. The extent of a plea of <i>res judicata</i>	339
280. Requisites of a plea of <i>res judicata</i>	341
281. Plea of a release.....	342
282. Plea of a stated account.....	344
283. Plea of an account settled.....	345
284. Plea of an award.....	345
285. Plea of <i>bona fide</i> purchaser.....	345
286. Same — Notice.....	347
287. Plea of paramount title.....	348
288. Pleas to bills for discovery.....	349
289. Pleas to bills not original.....	350
290. The form and frame of a plea.....	351
291. Plea must be supported by certificate of counsel and affidavit of defendant.....	353
292. Filing the plea.....	354
293. Proceedings to be taken by plaintiff upon a plea filed.....	354
294. The argument of a plea.....	355
295. Allowing pleas.....	356
296. Saving the benefit of a plea to the hearing.....	358
297. Ordering a plea to stand for an answer.....	358
298. Overruling pleas.....	359
299. Proceedings upon a plea of matter of record.....	359
300. The effect of joining issue upon and establishing plea by proof — The English rule abolished.....	360
301. The effect of falsifying a plea in bar.....	361
302. The effect of proving dilatory pleas.....	362
303. Plea allowed by prematurely excepting to answer.....	362
304. Amending pleas.....	364

CHAPTER XIII.

DISCLAIMER.

305. Defense by disclaimer.....	365
306. Practice in regard to disclaimers.....	365

CHAPTER XIV.

ANSWERS.

307. When the answer must be filed.....	369
308. Dilatory objections not presented by answer.....	369

	<i>Page.</i>
§ 309. The twofold office of an answer in equity.....	369
310. The general nature of an answer as a defense.....	371
311. Any number of consistent defenses may be set up in an answer.....	372
312. What defenses in equity must be set up by answer.....	372
313. Any defense to the merits may be set up by answer.....	374
314. Same — Equity rule 39.....	375
315. Same — A judicial construction of equity rule 39.....	376
316. Defendant's duty to make discovery.....	378
317. The manner in which the defendant must answer the bill....	379
318. Defendants must seek information to enable them to give discovery.....	382
319. Discovery of deeds, papers and documents.....	383
320. Exceptions to the rule requiring the defendant to make discovery.....	383
321. Same — Manner of making objections to giving the discovery.....	384
322. Effect of answer as evidence when defendant denies allegations of the bill.....	384
323. Same — Tested by the rules of evidence.....	386
324. Answer is not evidence for defendant when it admits allegations of the bill and states new matter to avoid them.....	387
325. Admissions made by defendant in his answer are conclusive..	387
326. Answer of one defendant not evidence against co-defendant..	388
327. Setting cause down for hearing on bill and answer.....	388
328. Effect of answer as evidence when oath is waived.....	389
329. The rule determining what allegations in the answer are responsive.....	389
330. When answer of one defendant inures to the benefit of his co-defendant.....	391
331. Answers in patent suits.....	392
332. Same — Notice of proof and decree.	394
333. Same — Defense that device is not patentable.....	395
334. Procedure to compel answer.....	396
335. Same — When nominal party need not appear.....	397
336. The form of an answer.....	397
337. Signature and oath of defendant.....	399
338. Answer by a married woman.....	399
339. Answer by an infant.....	400
340. Same — Method of appointing guardian <i>ad litem</i>	402
341. Answer of idiots and lunatics.....	403
342. Answer of corporations.....	403
343. Amending answers and filing supplemental answers.....	404
344. Same — United States equity rules.....	406
345. Requisites of application to amend an answer, or file a supplemental answer.....	407
346. When answer may be amended, or supplemental answer filed.....	407
347. Supplemental answer to amended bill.....	408
348. A further answer upon sustaining exceptions for insufficiency.....	408
349. Taking answers off the file.....	409

CHAPTER XV.

PROCEEDINGS TO BE TAKEN BY PLAINTIFF UPON AN ANSWER
FILED.

	<i>Page.</i>
§ 350. Proceedings by plaintiff upon answer of defendant filed.....	410
351. Same — Due order of proceeding.....	410

CHAPTER XVI.

EXCEPTIONS TO ANSWERS.

352. Two classes of exceptions to answers.....	412
(a) EXCEPTIONS FOR INSUFFICIENCY.	
353. Definition of exceptions for insufficiency.....	413
354. When exceptions for insufficiency will be sustained.....	413
355. Exceptions to answers not under oath.....	413
356. Form and requisites of exceptions for insufficiency.....	414
357. When exceptions for insufficiency must be filed.....	415
358. Procedure on exceptions for insufficiency.....	415
359. Same — Further answer when exceptions allowed.....	416
360. Same — Costs upon exceptions.....	417
(b) EXCEPTIONS FOR SCANDAL AND IMPERTINENCE.	
361. Definition of scandal and impertinence.....	417
362. Each exception must be supported <i>in toto</i>	417
363. Filing the exceptions and procedure thereon.....	418

CHAPTER XVII.

REPLICATIONS.

364. Lord Redesdale's definition and history of the replication....	419
365. Special replications prohibited by United States equity rule..	420
366. The form of a general replication.....	421
367. The office of the general replication....	421
368. Same — When replication to answer must be filed.....	422
369. When replication to plea must be filed.....	423
370. Filing replication <i>nunc pro tunc</i>	423
371. Replications when there are several answers.....	423

CHAPTER XVIII.

CROSS-BILLS.

372. Origin of cross-bills.....	424
373. Lord Redesdale's definition of a cross-bill.....	425
374. Cross-bill defined by the United States supreme court.....	426
375. The essential characteristics of a cross-bill.....	427
376. The cross-bill must be germane to the original bill.....	427
377. Cross-bill for relief.....	429
378. Relief on answer without cross-bill.....	430

	<i>Page.</i>
§ 379. Cross-bill for discovery.....	431
380. Frame of cross-bill — Parties to cross-bill — Filing cross-bill...	432
381. A cross-bill is an ancillary suit.....	433
382. Service of subpoena on cross-bill.....	434
383. Priority of right to an answer to the original and cross-bills..	435
384. Same — Enlarging publication till cross-bill is answered.....	436
385. Original and cross-bills heard together.....	436
386. Effect on cross-bill of dismissing original bill.....	436
387. No appeal from decree dismissing cross-bill.....	437

CHAPTER XIX.

EVIDENCE.

388. Rules of evidence same at law and in equity.....	441
389. Sources of evidence in suits in equity.....	442

(a) THE ENGLISH CHANCERY PROCEDURE IN THE EXAMINATION OF WITNESSES.

390. All evidence taken by depositions.....	442
391. Two kinds of examinations in chancery.....	443
392. Officers by whom witnesses were examined.....	443
393. Method of proceeding before examiners.....	444
394. Examination by commissioners.....	444
395. Examination <i>de bene esse</i>	445
396. Examination of witnesses abroad — Commission and letters rogatory.....	446

(b) FEDERAL EQUITY PROCEDURE IN THE EXAMINATION OF WITNESSES.

397. Mode of proof in equity prescribed by federal statutes and equity rules.....	446
398. Three months allowed to take testimony.....	447
399. Competency of witnesses in the United States courts.....	447
400. Two methods of examining witnesses <i>de bene esse</i>	448
401. Depositions <i>de bene esse</i> under act of congress.....	448
402. Same — Manner of taking.....	449
403. Same — Certificate and transmission.....	450
404. Same — Statutes construed strictly.....	450
405. Depositions <i>de bene esse</i> by commission under equity rule....	451
406. Four methods of examination in chief.....	451
407. Depositions “according to common usage”.....	452
408. Same — Act of congress of March 9, 1892.....	453
409. Depositions taken by commission under the equity rules....	453
410. Oral examination of witnesses before an examiner.....	454
411. Oral examination of witnesses in open court on the final hear- ing.....	456
412. Procedure to compel attendance of witnesses before examiners and commissioners.....	457
413. Procedure to compel production of books, writings and docu- ments before examiners and commissioners.....	458

	<i>Page.</i>
§ 414. Distance witnesses may be required to travel for examination	459
415. Bill <i>in perpetuum rei memoriam</i>	460
416. Depositions in District of Columbia in suits pending elsewhere	461
417. Letters rogatory	462
418. Same — Federal statutory regulations	463
419. Examination to impeach the competency and credibility of witness	465
420. Demurrer to answering interrogatories	466
421. Motions to suppress depositions	467
422. Re-examination of witnesses	467

(c) DOCUMENTARY EVIDENCE.

423. Judgments and decrees conclusive evidence, when	467
424. Judgments of other states entitled to full faith and credit . .	468
425. Foreign judgments — Their weight as evidence controlled by the rule of reciprocity	470
426. Parol evidence admissible to show the precise question deter- mined by a former judgment or decree	471
427. Judgments and decrees as muniments of title to real estate . .	472
428. Docket entries evidence of receipt of money by United States marshal	472
429. Authentication of judgments	472
430. Authentication of foreign judgments	473
431. Authentication of legislative acts	473
432. Authentication of foreign laws	474
433. Authentication of records from other states kept in offices not appertaining to courts	474
434. Copies of records of the general land office	475
435. Copies of foreign laws and records relating to land titles in the United States	476
436. Copies of department records and papers	476
437. Copies of records and documents in the office of the solicitor of the treasury	476
438. Copies of instruments and papers in comptroller's office	476
439. Copies of organization certificates of national banks	477
440. Transcripts from books of the treasury department	477
441. Copies of postoffice records and of auditor's statement of ac- counts	478
442. Copies of statements of demands by the postoffice department	478
443. Copies of the records of the patent office	478
444. Copies of foreign letters patent	479
445. Printed copies of specifications and drawings of patents	479
446. Extracts from the journals of congress	479
447. Copies of records in the offices of consuls and commercial agents	479
448. Little & Brown's edition of the United States statutes and treaties to be evidence	480
449. Proof of the execution of deeds and other private writings . .	480
450. Same — Secondary evidence of execution	480

	<i>Page.</i>
§ 451. Exceptions to the rule requiring proof of execution of private writings — Ancient instruments	481
452. Same — When the deed is produced by the adverse party claiming an interest under it.	482
453. Same — Where defendant by his answer admits the execution	483
454. Proof of the execution of wills and testaments devising real estate at common law	483
455. The courts of the United States have no jurisdiction to take proof of the execution of wills and testaments.	485
456. Proof of the execution and contents of lost instruments.	485
457. Same — Lost will	486
458. Same — Judicial records	486
459. Same — Lost deposition	486
460. Same — When the instrument is beyond the jurisdiction of the court	486
461. Proof of exhibits, <i>viva voce</i> , at the hearing.	486
462. The production of documents by defendant as evidence for plaintiff	489
463. Passing publication of the testimony	490
464. Examination of witnesses <i>ad informandum conscientiam judicis</i> , obsolete.	491
(d) JUDICIAL NOTICE.	
465. Judicial notice — General rule.	492
466. Federal courts take judicial notice of the federal constitution and laws	492
467. Same — Corporations created by federal law	493
468. Same — Treaties made by the United States	493
469. Same — Establishment of territorial governments.	493
470. Federal courts take judicial notice of state laws.	493
471. Same — United States supreme court on writ of error to state court	493
472. Courts of the United States take judicial notice of the state constitutional conventions.	495
473. Federal courts take judicial notice of charters granted by a state, when.	495
474. Federal courts take judicial notice of the laws of an antecedent government	496
475. The courts of the United States will not take judicial notice of foreign laws.	497
476. Judicial notice of seals of notaries public	498
477. Courts of one state do not take judicial notice of the laws of another state.	498
478. Judicial notice of territorial extent of governmental jurisdiction.	499
479. Judicial notice of rules of navigation	499
480. Judicial notice of the proclamations of the president of the United States.	500

Page.

§ 481.	Judicial notice of the rules and regulations of the executive departments of the federal government	500
482.	Judicial notice of the persons who preside over the patent office	500
483.	Courts do not take notice of military orders	500
484.	Judicial notice of the ordinary meaning of words	501
485.	In taking judicial notice judges may refresh their memory and inform their conscience	501

(e) PRESUMPTIONS.

486.	Classification of presumptions	501
487.	Presumptions of fact	501
488.	Same — Presumption as to the delivery of letters	502
489.	Same — Domicile	503
490.	Disputable presumptions of law	504
491.	Same — Presumption that public officers have done their duty	505
492.	Same — Regularity of judicial proceedings	505
493.	Same — That state courts will do what federal constitution and laws require	505
494.	Same — Presumptions in favor of patents issued for public lands	506
495.	Same — Persons acting in a public office	506
496.	Same — Presumption of death from seven years' absence	506
497.	Same — Persons presumed to intend necessary consequences of act	507
498.	Same — Presumption of legitimacy — Testamentary recognition of child — Civil-law rule	507
499.	Same — Presumption of date and delivery of deeds	508
500.	Same — Presumption of grant from long-continued possession	509
501.	Same — Possession by husband of wife's separate property creates no presumption of a gift	513
502.	<i>Fraus est odiosa et non præsumentenda</i> — Meaning of the maxim — Fraud established by circumstantial evidence	513
503.	Presumption of the satisfaction and ademption of legacies	514
504.	Presumptions arising from the suppression of testimony	515
505.	Conclusive presumptions of law	516

(f) ADMISSIONS.

506.	Classification of admissions	517
507.	Actual admissions upon the record	517
508.	Constructive admissions upon the record	517
509.	Admissions by stipulation	518

(g) SOME GENERAL RULES OF EVIDENCE.

510.	Parol evidence inadmissible both at law and in equity to vary agreements in writing — Rule stated by United States supreme court.	518
511.	Same — Extrinsic evidence to identify property and persons ..	520
512.	Same — Patent ambiguities	520
513.	Admissibility of extrinsic evidence in the interpretation of deeds and wills — English rule as stated by Mr. Spence	521

	<i>Page.</i>
§ 514. Same— When the evidence will be admitted	522
515. Same— Same — Extrinsic evidence to repel presumptions of law relating to legacies.....	525
516. Vice-chancellor Wigram's seven propositions regarding the construction of wills.....	527
517. Extrinsic evidence admissible to correct fatal misdescription of real estate in a will.....	529
518. The best evidence must be adduced.....	531
519. Same— Written instruments	533
520. The evidence must be confined to the matters in issue.....	533
521. Same— Confessions and admissions.....	533

CHAPTER XX.

INJUNCTIONS.

522. Definition and classification of injunctions—Temporary and perpetual injunctions.....	535
523. Same— Common and special injunctions.....	536
524. Same— Prohibitory and mandatory injunctions.....	537
525. Jurisdiction and power of the federal courts to grant injunctions	538
526. Same— Federal courts may grant injunction where it may be granted by English chancery.. ..	540
527. Writs of injunction granted by supreme court justices and circuit court judges.....	540
528. Writs of injunction granted by district judges.....	541
529. No injunction granted until after bill filed.....	542
530. Same— Bill must contain special prayer for writ of injunction	542
531. Bill for injunction must be verified	543
532. No provisional special writ of injunction granted without notice	543
533. Same— Temporary restraining order pending application for special injunction.....	544
534. Same— Same — Application for special injunction—Procedure	545
535. Injunction bond — Condition.....	546
536. Motions to dissolve injunctions — Abatement.....	546
537. Motion to dissolve the common injunction.....	547
538. Motions to dissolve special injunction — The rule as stated by Justice Story.....	548
539. Assessment of damages on dissolution of injunction.....	549
540. Injunctions to restrain proceedings at law.....	549
541. Injunctions issued by federal courts to stay proceedings in state courts.....	550
542. Injunctions to relieve against judgments — The rule stated by Chief Justice Marshall.....	551
543. Injunctions issued by federal courts against judgments in state courts.....	552
544. Injunction to restrain threatened defenses to a "proposed action at law".....	552

	<i>Page.</i>
§ 545. Restraining the prosecution of suits in foreign jurisdictions..	552
546. Injunction to restrain the collection of taxes.	553
547. Same — Overvaluation of property for taxation... ..	554
548. Same — Same — National bank stock..... ..	555
549. Injunctions against unlawful restraint of trade and commerce	557
550. Same — Not granted by federal courts to restrain monopoly in necessary of life..... ..	559
551. Injunctions against unlawful restraint of the import trade..	563
552. Injunctions against violations of the acts to regulate inter- state commerce..... ..	564
553. Injunctions against infringements of common-law trade-marks	567
554. Injunctions against infringements of registered trade-marks..	568
555. Injunctions against infringements of copyrights..... ..	568
556. Same — Dramatic and musical compositions — Procedure — Writ of injunction served anywhere in the United States..	570
557. Restraint of copyright frauds..... ..	571
558. Injunctions against infringements of patents for inventions..	572
559. Injunctions against executive state officers — No suit against a state maintainable	573
560. Same — Rules announced by the United States supreme court since the Eleventh Amendment..... ..	574
561. Same — Restraint of state railroad commissions	578
562. Injunctions to restrain waste and trespass..... ..	580
563. Injunctions to restrain nuisances, private and public.....	581
564. Same — Obstruction of interstate commerce	584
565. Summary of the ordinary objects of the writ of injunction... ..	587
566. Injunctions in removal cases continued..... ..	588
567. No injunction against appointment or removal of public offi- cers	588
568. No injunction to stay criminal proceedings	589
569. Breach of injunctions	589
570. Same — Contempt — Power to punish..... ..	590
571. Same — Procedure in contempt cases..... ..	591

CHAPTER XXI.

WRIT NE EXEAT REGNO.

§ 572. Nature and purposes of the writ..... ..	593
573. Procedure in the English chancery to obtain the writ.....	595
574. The form of the writ <i>ne exeat regno</i>	596
575. Discharge of the writ	597
576. Writ <i>ne exeat</i> issued by federal courts and judges.....	598
577. Same — Where imprisonment for debt is abolished.....	598
578. Same — Bill must specially pray the writ..... ..	599

VOLUME II.

CHAPTER XXII.

RECEIVERS.

	<i>Page.</i>
§ 579. The scope of this chapter.....	602
580. Receiverships and receivers defined.....	602
581. The power to appoint receivers inherent in courts of equity..	605
582. When a receiver will be appointed — Judicial discretion.....	606
583. Same — In suits to foreclose mortgages	610
584. Appointment of a receiver does not affect the right to the property.....	610
585. No receiver appointed until bill filed.....	611
586. Receiver appointed before answer filed.....	612
587. Application for appointment of receiver and notice.....	612
588. Appointment of receivers — Procedure in the English chan- cery as it existed A. D. 1842.....	613
589. Power of federal courts to appoint managing receivers of rail- roads.....	619
590. Same — Reason for exercising power	620
591. Mortgagees not entitled to income before demand made.....	623
592. The objects and purposes of railroad receiverships.....	623
593. Grounds for the appointment of a railroad receiver.....	625
594. Order appointing a railroad receiver — What it should contain	626
595. Who may be appointed a railroad receiver.....	629
596. Same — Federal statutory restrictions.....	630
597. Bond and oath of the receiver.....	630
598. Powers and duties of a railroad receiver — He must execute the orders of the court.....	632
599. Same — Must manage and operate the road according to state laws.....	635
600. Accounts of receivers — Procedure... ..	636
601. Compensation of receivers.....	638
602. Adoption of existing contracts by receivers.....	639
603. Suits against receivers.....	640
604. Same — Federal statutes authorizing suits without leave of court.....	641
605. Same — Same — Suits for personal injury — After property restored to owner.....	642
606. Same — Suits <i>in rem</i> touching the trust estate.....	643
607. Right and duty of receiver to defend suits.....	644
608. Suits by receivers.....	645
609. Application for writ of assistance by receivers.....	646
610. A receiver cannot sue in a foreign jurisdiction.....	647
611. Appeal by receivers.....	648
612. Conflict of jurisdiction in receivership cases.....	649

	<i>Page.</i>
§ 613. Same — When jurisdiction attaches.....	649
614. Advice to receivers.....	650
615. Removal of receivers.....	651
616. Discharge of receivers.....	652
617. Ancillary receivers — Courts of primary and ancillary jurisdiction.....	653
618. Preferential debts in railroad receiverships.....	654
619. Same — Rule as to outstanding debts stated by Chief Justice Fuller.....	655
620. Same — Supplies furnished on faith of current earnings.....	655
621. Same — Same — No absolute rule for all cases.....	656
622. Same — Receiver's certificates.....	657
623. Debt for original construction not a preferential debt.....	658

CHAPTER XXIII.

INTERVENTION.

624. Intervention derived from and defined by the civil law.....	659
625. Two kinds of intervention in the English chancery.....	661
626. Intervention by formal bill.....	661
627. Examination <i>pro interesse suo</i> , or intervention by petition....	662
628. Both methods of intervention adopted in the federal courts..	664
629. The judicial procedure in interventions in railroad receivership case.....	665
630. Same — Pleadings, order of reference, proceedings in the master's office, report, action of the court, and appeal.....	667
631. Right of bondholders to intervene.....	670
632. Right of stockholders to intervene.....	670

CHAPTER XXIV.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

633. When and how a suit in equity becomes defective or is abated— Lord Redesdale's statement of the doctrine.....	671
634. Same — Abatement.....	674
635. Classification of bills to revive and continue suits.....	675
636. English chancery remedies of supplement and revivor adopted in the federal courts.....	675
 <i>a</i>) SUPPLEMENTAL BILLS, AND ORIGINAL BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.	
637. Leave to file a supplemental bill — Equity rule 57.....	676
638. When a supplemental bill is the appropriate remedy — General rule.....	677
639. Same — Upon a new interest.....	680
640. Same — When plaintiff becomes a lunatic.....	680
641. Same — Upon the determination of the interest of a plaintiff suing <i>in autre droit</i>	681

	<i>Page.</i>
§ 642. When an original bill in the nature of a supplemental bill is the appropriate remedy	681
643. Same — Rule stated by Lord Redesdale	684
644. At what stage of the suit a supplemental bill may be filed....	686
645. Frame of supplemental bills, and original bills in the nature of supplemental bills — Parties — Subpcena.....	687
646. Demurrers to supplemental bills.....	691
647. Pleas to supplemental bills	691
648. Answers to supplemental bills.....	691
 (b) BILLS OF REVIVOR, ORIGINAL BILLS IN THE NATURE OF BILLS OF REVIVOR, AND BILLS OF REVIVOR AND SUPPLEMENT.	
649. Revivor derived from the civil law	692
650. Revivor in federal equity — Equity rule 56	692
651. (1) Bills of revivor; (2) Original bills in the nature of bills of revivor; (3) Bills of revivor and supplement — Distinction and functions.....	693
652. Same — Frame of such bills — Parties — Defenses.....	698
653. The order of revivor.....	702
654. The right of plaintiff and his representatives to revive	702
655. The right of defendant to compel plaintiff to revive or have order of dismissal.....	703
656. The right of defendant and his representatives to revive after decree	704
657. Bill to carry a decree into execution.....	706

CHAPTER XXV.

DISMISSAL OF BILLS.

658. Dismissal by plaintiff — English rule	707
659. Same — Rule in the circuit courts of the United States.....	709
660. Motion by defendant to dismiss bill — English rule.....	711
661. Same — Rule in the circuit courts of the United States.....	712
662. Procedure by defendant to obtain the order of dismissal.....	713
663. The effect of the dismissal	713
664. Dismissal after election to proceed at law.....	714
665. Effect of dismissal on cross-bill	714
666. Dismissal for want of jurisdiction	714

CHAPTER XXVI.

INTERLOCUTORY APPLICATIONS AND ORDERS.

667. Interlocutory applications in the English chancery.....	715
668. Classification of motions and petitions in suits in equity in the circuit courts of the United States.....	718
669. All motions as well as petitions should be written.....	718
670. Motions <i>ore tenus</i> are frequently entertained	718
671. Orders grantable of course by the clerk of the court at rules.	719

	<i>Page.</i>
§ 672. Special orders.....	720
673. The payment of money into court	720
674. Same — Federal statutes	721

CHAPTER XXVII.

HEARING AND REHEARING.

675. Convenience of considering the hearing and rehearing in the same chapter.....	722
--	-----

(a) THE HEARING.

676. Setting the cause down for hearing — English chancery procedure.....	722
677. Same — Procedure in the federal courts	724
678. When a cause may be set down for hearing.....	724
679. Hearing the cause	725
680. Hearing on bill and answer	726
681. On final hearing interlocutory decree may be vacated	727

(b) REHEARING.

682. Petition for rehearing — What to contain — When to be filed..	728
683. Same — Procedure.....	729
684. Rehearing upon interlocutory decree.....	730
685. Rehearing after appeal.....	731
686. Order granting or refusing rehearing not reviewable on appeal	732
687. Rehearing where no appeal lies.....	732

CHAPTER XXVIII.

DECREES, AND THEIR CORRECTION AND ENFORCEMENT.

688. Plan of this chapter.....	734
--------------------------------	-----

(a) THE GENERAL NATURE OF DECREES.

689. Definition, classification and form of decrees.....	734
690. Drawing up, passing, entering and enrolling decrees — English chancery procedure	736
691. Enrollment of decrees in the federal courts	739
692. Interlocutory decree defined	739
693. Final decree defined.....	741
694. Final decree on demurrer	743
695. Decree in foreclosure suits	743
696. Same — Money decrees for balance above proceeds of sale...	748
697. Requisites of a final decree of foreclosure	748
698. Dependent or subsequent final decrees in a cause	749
699. Decrees upon intervening petitions	751
700. Decrees for or against receivers on their accounts.....	753
701. Decrees in equity either <i>in personam</i> or <i>in rem</i>	753
702. Final decree <i>pro confesso</i>	753
703. Decrees against infants.....	754

	<i>Page.</i>
§ 704. Liens of judgments and decrees — Federal statutes	754
705. Same — Same — Limitations	755
706. Interest on judgments and decrees.....	755
707. Same — Ten per centum damages on appeal for delay — Rules of appellate courts.....	756
 (b) REMEDIES FOR THE CORRECTION, ALTERATION AND REVERSAL OF DE- CREES.	
708. Four remedies for the correction of decrees.....	756
709. Correction of clerical mistakes in decrees.....	757
710. Bill of review — Its nature and office — English chancery pro- cedure stated by Lord Redesdale.....	757
711. Same — Same — Further statement of the English chancery procedure.....	761
712. Remedy by bill of review in the federal courts.....	765
713. Same — Bill of review for errors apparent must be brought in time allowed for appeal.....	766
714. Same — Parties to bills of review.....	767
715. Same — Leave to file a bill of review.....	767
716. Same — Same — Performance of the decree	767
717. No bill of review after decision on appeal unless by leave of the appellate court	767
 (c) ENFORCING THE EXECUTION OF DECREES.	
718. Execution of decrees in equity — Originally <i>in personam</i> only — History of the English chancery procedure.....	768
719. Same — Same — Same — Reform of the English chancery pro- cedure by the orders of 1839	769
720. Execution of decrees in equity in the federal courts — Writ of assistance.....	769
721. Same — Writ of <i>fiery facias</i> for the collection of money decreed to be paid.....	770
722. Same — Writs of attachment and sequestration to enforce....	770
723. Same — Orders affecting persons not parties to the suit.....	771
724. Execution of decrees ordering sales of property — Federal stat- ute	771
725. Execution of decrees for partition of real estate.....	774
726. Execution of decrees to settle boundaries	775
727. Service of orders and decrees — “Writ of execution”.....	775
728. Final record in equity and admiralty cases.....	775

CHAPTER XXIX.

FEIGNED ISSUES.

729. Inquiries directed at the hearing	776
730. Feigned issues — When directed	777
731. Issue cannot be directed before a hearing.....	777
732. Order for an issue — Other procedure	778

	<i>Page.</i>
§ 733. In equity cases, federal courts not bound to submit any issue of fact to a jury.....	780
734. Feigned issues in patent cases — Federal statute	783
735. Feigned issues upon interventions in railroad foreclosure suits	783
736. Verdict is advisory only.....	784
737. New trials.....	784
738. Retaining the bill with liberty to bring an action at law.....	786
739. A case at law.....	787

CHAPTER XXX.

PROCEEDINGS IN THE MASTER'S OFFICE

(a) GENERAL RULES AND PRINCIPLES.

740. Appointment of masters — Equity rule 82 — Federal statutes.	790
741. Oath of office of master.....	791
742. Compensation of masters.....	792
743. Masters and their general powers defined by the United States supreme court.....	792
744. Same — Report of a master advisory only.....	794
745. Same — Weight of the master's finding.....	794
746. The master cannot exceed the decree of reference	795
747. Pleading in the master's office	796
748. Discovery in the master's office.....	797
749. Evidence in the master's office	798
750. Parties entitled to attend before the master on a reference...	799
751. Same — Right of defendant to attend after decree <i>pro confesso</i>	801

(b) THE METHOD OF TAKING AND STATING AN ACCOUNT.

752. The successive steps in taking and stating an account.....	801
753. The preliminary hearing and interlocutory decree.....	802
754. Same — Decree must be interlocutory only — Correct procedure stated by Chief Justice Taney.....	802
755. The directions which should be contained in the order of reference	806
756. Presenting the reference to the master	807
757. "Warrant to consider decree" — English chancery procedure	807
758. Same — United States equity rules — Notice	808
759. Bringing in debtor and creditor account — First step in taking the account.....	808
760. Examination of the accounting party for discovery — Second step in taking the account	809
761. Same — Same — Examination upon interrogatories — Procedure	810
762. Production of documents by the accounting party — Third step in taking the account	811
763. Filing the charge and proceedings thereon — Fourth step in taking the account.	812

	<i>Page.</i>
§ 764. Filing the discharge and proceedings thereon — Fifth step in taking the account	814
765. Warrant to show cause why the master should not proceed to prepare his report — Sixth step in taking the account.....	815
766. Warrant on preparing the report — Seventh step in taking the account.	816
767. Preparing the master's report — Eighth step in taking the account — What report to contain.....	816
768. Same — Stating the account by the master.....	817
769. Same — Same — Rule for computation of interest — Chancellor Kent's rule....	818
770. Same — Same — Compounding interest against trustees.....	818
771. Same — Same — Same — Date to which interest should be computed — Master's report liquidates the debt.....	819
772. Warrant that the master has prepared the draft of his report — Ninth step in taking the account.....	820
773. Filing objections to the master's draft report — Tenth step in taking the account.....	820
774. Warrant to settle and sign the master's report — Eleventh step in taking the account.....	821
775. Filing the master's report — Twelfth step in taking the account	821
776. Exceptions to the master's report — Time for filing — Thirteenth step in taking the account.....	822
777. Same — Same — Same — Office and requisites of exceptions..	822
778. Same — Irregularities in the proceedings before the master...	824
779. Hearing the exceptions by the court — Fourteenth step in taking the account.....	825
780. Costs of exceptions.....	826
781. Further directions.....	826
(c) OTHER PROCEEDINGS IN THE MASTER'S OFFICE.	
782. Administration of assets — Equity rule	827
783. References in the administration of assets.....	827
784. Same — Creditor's charge....	827
785. Same — Examination of creditor by the master for discovery	828
786. Exceptions for scandal and impertinence referred to the master	828
787. Exceptions to an answer for insufficiency not referred to the master.....	828
788. Petition to review master's report....	828
789. Masters should keep register of the proceedings in causes referred to them.....	829

CHAPTER XXXI.

APPEALS IN EQUITY.

(a) DISTRIBUTION OF APPELLATE JURISDICTION BY ACT OF MARCH 3, 1891— GENERAL STATEMENT.

790. Decrees in equity reviewed on appeal only.....	831
791. The exclusive rule of federal appellate jurisdiction furnished by judiciary act of March 3, 1891.....	832

	<i>Page.</i>
§ 792. Appellate procedure not changed by act of March 3, 1891.....	832
793. No pecuniary limit on appeals from the circuit and district courts	833
794. Pecuniary limit on appeals from the circuit court of appeals.	833
795. Appellate jurisdiction of the supreme court over highest courts of the states, not affected by judiciary act of March 3, 1891.	833
(b) APPELLATE JURISDICTION OF THE SUPREME COURT OVER THE DISTRICT COURTS AND CIRCUIT COURTS.	
796. Six classes of cases which may be appealed direct from the district courts and circuit courts to the supreme court.....	836
797. Appeal to the supreme court upon the question of jurisdiction alone	837
798. Same — Certifying the question of jurisdiction.....	838
799. Appeals in cases arising under the constitution or laws of the United States.....	839
800. Same — <i>Habeas corpus</i>	841
801. Time within which appeals to the supreme court must be taken — Two years.....	841
802. Certificate of question of jurisdiction must be granted during term in which decree is entered	841
803. No appeals but from final decrees — Exception	841
804. Same — Order remanding cause	842
(c) APPELLATE JURISDICTION OF THE CIRCUIT COURTS OF APPEALS OVER THE DISTRICT COURTS AND CIRCUIT COURTS.	
805. The class of cases which may be appealed from the district courts and circuit courts to the circuit courts of appeals....	842
806. Same — In what cases the judgments and decrees of the circuit courts of appeals are final.....	843
807. Same — Ancillary suits.....	843
808. Time allowed for taking appeals to the circuit courts of appeals — Six months.....	844
809. Same — Interlocutory appeals — Thirty days.....	844
(d) APPELLATE JURISDICTION OF THE SUPREME COURT OVER THE CIRCUIT COURTS OF APPEALS.	
810. Three methods by which the appellate jurisdiction of the supreme court over the circuit courts of appeals may be invoked.....	844
811. Certified question	844
812. Same — Rules of procedure.....	845
813. Same — Same — Certificate must contain statement of facts — Supreme court rule	846
814. <i>Certiorari</i>	847
815. When the writ of <i>certiorari</i> will be issued.....	847
816. Application for writ of <i>certiorari</i> — Supreme court rule.....	848
817. Appeals and writs of error.....	848
818. Time allowed for taking appeals from circuit court of appeals to supreme court.....	849

(c) APPELLATE PROCEDURE IN THE FEDERAL COURTS.

Page.

§ 819.	The system of appellate procedure adopted in the federal courts.....	849
820.	Petition for appeal — Assignment of errors.....	850
821.	Allowance of appeals — Citation.....	851
822.	Same — Same — Summary of the procedure by Chief Justice Fuller.....	854
823.	Same — Same — Service of citation.....	854
824.	<i>Supersedeas</i> bond.....	855
825.	Cost bond in appeals from interlocutory decrees.....	855
826.	All appeals returnable in thirty days.....	856
827.	Docketing case and filing record.....	856
828.	Parties to appeals — Joint decrees.— Summons and severance.....	857
829.	Same — Several decrees.....	859
830.	Same — Death of party after decree and before appeal.....	860
831.	Same — Death of party after appeal.....	860
832.	Transcript of the record on appeal.....	862
833.	Same — Translations.....	863
834.	<i>Certiorari</i> for diminution of the record.....	863
835.	Printing the record.....	864
836.	Briefs.....	865
837.	Objections to evidence in equity and admiralty cases.....	867
838.	Judgments and decrees on appeal.....	867
839.	Same — On appeals from interlocutory decrees under judiciary act of March 3, 1891.....	868
840.	Rehearing.....	868
841.	The mandate.....	869

CHAPTER XXXII.

COSTS.

842.	Costs in federal courts regulated by statute and court rules..	871
843.	Expense of administering a trust estate — Counsel fees.....	872
844.	Costs in equity discretionary.....	872
845.	No costs when suit dismissed for want of jurisdiction.....	873
846.	Supreme court costs.....	873

APPENDIX I.

Constitution of the United States.....	877
--	-----

APPENDIX II.

Original judiciary act, September 24, 1789.....	897
Judiciary act, March 3, 1875.....	927
Judiciary act, March 3, 1887, as corrected by act August 13, 1888.....	934
Judiciary act, March 3, 1891.....	940
Joint resolution to provide for the organization of the circuit courts of appeals.....	947

Page.

Act amending section 7, judiciary act, March 3, 1891	948
Act amending section 5, judiciary act, March 3, 1891	949
Suits against the government — An act to provide for the bringing of suits against the government of the United States.....	950

APPENDIX III.

Rules of the supreme court of the United States.	957
Order in reference to appeals from the court of claims — Regulations prescribed by the supreme court of the United States under which appeals may be taken from the court of claims to said supreme court	979
Rules of practice in equity.....	981
Rules of practice in admiralty.....	1010
Rules of the court of claims.....	1028
Rules of the United States circuit court of appeals.....	1064

APPENDIX IV.

English orders in chancery:	
Orders of April 3, 1828, as amended November 23, 1831.....	1129
Orders of December 21, 1833.....	1147
Orders of May 9, 1839	1161
Orders of May 10, 1839.	1163
Orders of August 26, 1841	1173

APPENDIX V.

Forms in equity.....	1189
----------------------	------

TABLE OF CASES.

References are to pages.

A.

- A. & V. Coal Co. v. Central R. Co., 669, 794, 801.
 Abraham v. North German Fire Ins. Co., 193.
 Abraham v. Ordway, 258.
 Adair v. Thayer, 730.
 Adams v. Adams, 386.
 Adams v. Robinson, 198.
 Agar v. Regent's Canal Co., 379.
 Agawam Woolen Co. v. Jordan, 393, 394.
 Aggas v. Pickerell, 334.
 Alardes v. Campbell, 345, 376.
 Albuquerque v. National Bank, 554.
 Alexander v. Horner, 47, 255.
 Allen v. Baltimore & Ohio R. Co., 553, 576.
 Allen v. Blount, 198, 784.
 Allen v. Dallas & W. R. Co., 626.
 Allen v. Pullman Palace Car Co., 245, 553.
 Allen v. Randolph, 295, 301, 302, 305, 342, 376.
 Allen v. Southern Pac. R. Co., 841.
 Allen v. Wilson, 224.
 Alley v. Nott, 743.
 Alsop v. Riker, 258.
 Alston v. Jones, 143, 254.
 Alviso v. United States, 852.
 Ambler v. Choteau, 149, 278.
 American Ass'n, Lim., v. Eastern Kentucky Land Co., 10, 36, 252.
 American Bell Tel. Co. v. Western Union Tel. Co., 709.
 American Bible Society v. Price, 55.
 American Box Mach. Co. v. Crossman, 171.
 American Bridge Co. v. Heidelbach, 623.
 American Construction Co. v. Jacksonville Ry. Co., 847.
 American Life Ins. & Trust Co. v. Sackett, 680.
 American Steel & Wire Co. v. Wire Drawers' and Die Makers' Unions, 177, 272, 280, 354, 364, 408, 678.
 American Union Telegraph Co. v. Middleton, 80, 91.
 Ames v. Hager, 5.
 Amory v. Amory, 756.
 Amsinck v. Barclay, 593.
 Amy v. Watertown, 192.
 Anderson v. Dunn, 591.
 Anderson v. Watt, 13, 503, 504.
 Anderson v. White, 705.
 Andres v. Lee, 391, 392.
 Andrews v. Powys, 608, 610.
 Angel v. Smith, 643, 661, 664.
 Anon., 611, 661, 664.
 Antonio v. Greenhow, 576.
 Applegate v. Lexington & Carter County Mining Co., 482, 505.
 Apthorp v. Comstock, 777, 779, 780, 785.
 Arkansas v. Schliesholz, 838.
 Armitage v. Wadsworth, 334.
 Armstrong v. Ettlesohn, 5.
 Armstrong v. Lear, 498.
 Armstrong v. Trantam, 5.
 Armstrong v. United States, 500.
 Arndt v. Griggs, 108.
 Arnett v. Welch, 408.
 Arrowsmith v. Gleason, 79, 552.
 Asay v. Allens, 819.
 Aspen Mining & Smelting Co. v. Billings, 728, 732, 869.
 Aston v. Lord Exeter, 787.
 Atchison v. Morris, 197, 200.
 Atkins v. Fiber, etc. Co., 200.
 Atkins v. Wabash, St. L. & P. Ry. Co., 651.
 Atkinson v. Cummins, 521.
 Atkinson v. Leonard, 593.
 Atkins v. Wright, 383.
 Atterberry v. Gill, 179, 702.
 Attorney-General v. Bank of Chango, 543.
 Attorney-General v. Brown, 583.
 Attorney-General v. Clarendon, 589.
 Attorney-General v. Heishon, 533.
 Attorney-General v. Jackson, 332.
 Attorney-General v. Manchester & Leeds Ry. Co., 537.
 Attorney-General v. Mayor of Coventry, 664.
 Attorney-General v. New Jersey R. Co., 583.
 Atwill v. Ferrett, 275.

References are to pages.

Augerstein v. Hunt, 592.
 Austin v. Riley, 211, 212.
 Ayers v. Carver, 269, 426, 427, 429,
 431, 432, 436, 437.
 Ayers v. Chicago, 269, 429.
 Ayers, In re, 553, 575, 576.

B.

Babcock v. Millard, 109, 193, 434.
 Backhouse v. Middleton, 698.
 Bacon v. Northwestern Mut. Life
 Ins. Co., 12.
 Bacon v. Rives, 261.
 Bacon v. Texas, 835.
 Badger v. Badger, 150, 260, 336, 385,
 715.
 Bagley v. Adams, 359, 376.
 Bagnal v. Bagnal, 680.
 Bailey v. Hannibal & St. J. R. Co.,
 520.
 Bailey v. Wilson, 380.
 Bailey Washing Machine Co. v.
 Young, 399, 409.
 Baiz, In re, 501.
 Baker v. Adm'r of Backus, 603, 611.
 Baker v. Cummings, 334.
 Baker v. White, 742.
 Baker v. Whiting, 261, 730, 731.
 Balcom v. Life Ins. Co., 418.
 Balfour v. Portland, 555.
 Baltimore & Potomac R. Co. v. Fifth
 Baptist Church, 582.
 Baltimore & P. R. R. Co. v. Sixth
 Presb. Church, 505.
 Bampton v. Birchall, 293.
 Bank v. Calhoun, 665.
 Bank v. Deveaux, 2.
 Bank v. Earle, 101.
 Bank v. Epping, 73.
 Bank v. Geary, 389.
 Bank v. Leland, 109, 193, 434.
 Bank v. Levy, 381.
 Bank v. Lynn, 381.
 Bank v. Moss, 318.
 Bank v. Rose, 710.
 Bank v. White, 19.
 Bank of Columbia v. Hagner, 164.
 Bank of Kentucky v. Wistar, 869.
 Bank of Miss. v. Duncan, 606.
 Bank of Orleans v. Skinner, 543.
 Bank of United States v. Corcoran,
 502.
 Bank of United States v. Merchants'
 Bank, 470.
 Bank of United States v. Ritchie,
 400, 402, 754.
 Bank of United States v. White, 766,
 767.
 Bank of Utica v. Messereau, 379.
 Banks v. Booth, 777.
 Banks v. Manchester, 283, 389, 410,
 422, 569.
 Barber v. Mariner, 611.
 Barcus v. Gates, 169, 257.
 Barker v. Craig, 842.
 Barker v. Wyld, 389.
 Barker, Re, 403.
 Barley v. Adams, 361.
 Barnard v. Gibson, 741.
 Barney v. Baltimore, 46, 255.
 Barney v. Keokuk, 12.
 Barney v. Latham, 71.
 Barney v. Saunders, 819.
 Barr v. Gratz, 472, 482.
 Barr v. Lapsley, 164.
 Barret v. Beckford, 515.
 Barrow v. Hutton, 552.
 Barrow v. Rhinelander, 487.
 Barrow Steam Ship Co. v. Kane, 104.
 Barry v. Edmunds, 317, 320, 322, 323.
 Barry v. Foyles, 315, 324.
 Bartlett v. Ambrose, 258.
 Bartlett v. Gale, 130, 132, 389.
 Bartlett v. Gillard, 391.
 Barton v. Barbour, 620, 621, 625, 633,
 641, 642, 654, 784.
 Basse v. Gallagher, 781, 784.
 Basset v. Nosworthy, 346.
 Bast v. Bank, 519.
 Bates v. Clark, 577.
 Bates v. Coe, 393, 394.
 Batt v. Proctor, 52, 196.
 Batt Refrigerator Co. v. Gillett, 456.
 Baxter v. Willey, 79, 91.
 Bayley v. Adams, 334, 361.
 Beall v. Cowson, 822.
 Beals v. Illinois M. & T. R. Co., 391.
 Bean v. Smith, 735.
 Beard v. Burts, 270, 351, 766.
 Beardsley v. Ark. & Louisiana Ry.
 Co., 857, 858, 859.
 Beatty v. Knowler, 495.
 Beaupré v. Noyes, 835.
 Beauregard v. New Orleans, 79.
 Beck v. Beck, 269, 353, 355, 362, 430.
 Beck v. Insurance Co., 626.
 Beckford v. Wade, 509.
 Beddoes v. Pugh, 430.
 Bedell v. Bedell, 344.
 Beebe v. Robinson, 589.
 Beebe v. Russell, 741, 742.
 Behrens v. Sieveking, 330.
 Bein v. Heath, 19, 20, 74, 254, 546.
 Belford v. Scribner, 6, 570.
 Bell v. Johnson, 260.
 Bell v. Morris, 451.
 Bell v. Read, 338.
 Bell v. Woodward, 361, 376.
 Bellows v. Stone, 391.
 Benfield v. Solomon, 326.
 Benjamin v. New Orleans, 841.
 Bennett v. Butterworth, 245.
 Bennett v. Hoefner, 212.
 Bennett v. Taylor, 481.
 Benson v. Leroy, 666, 798.
 Benson v. Woolverton, 739.

References are to pages.

- Bentley v. Phelps, 730.
 Berkley v. Ryder, 430.
 Bernal v. Marquis of Donegal, 593.
 Bernard v. Toplitz, 679.
 Besan v. Leroy, 807.
 Bettes v. Dana, 676.
 Beverly v. Burke, 480.
 Bibb v. Allen, 467.
 Bill v. Western Union Tel. Co., 174.
 Binkershoff v. Brown, 169, 257.
 Binks v. Binks, 680, 682.
 Bischoffsheim v. Baltzer, 452, 453.
 Bissell v. Briggs, 76.
 Bissell v. Spring Valley Township, 339.
 Black v. Allen Co., 56, 186, 253, 325.
 Black v. Calnaghi, 707.
 Blackburn v. Jepson, 777.
 Blackburn v. Portland Gold Mining Co., 840.
 Blackburn v. Selma R. Co., 715.
 Blackburn v. Stace, 720.
 Blacklock v. Small, 873.
 Blackly v. Davis, 311, 313.
 Blair v. Green, 431.
 Blair v. Turtle, 197.
 Blake v. Blake, 720.
 Blake v. Doherty, 520.
 Blake v. Iron & Coal Co., 109, 434.
 Blanchard v. Brown, 79.
 Blanchard v. Putnam, 394.
 Blatch v. Archer, 516.
 Blease v. Garlington, 321, 457, 489, 715, 831.
 Blewitt v. Thomas, 348, 351, 352, 691.
 Blocker v. Phepoe, 533.
 Blondheim v. Moore, 611.
 Bloodgood v. Clark, 610, 612.
 Blossom v. Railroad Co., 750, 751, 774.
 Blount v. Burrow, 387.
 Bluck v. Elliott, 338.
 Blumlein, In re, 9.
 Blunt v. Burrow, 391.
 Blyman v. Brown, 786, 787.
 Board of Liquidation v. McComb, 576, 577.
 Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co., 260.
 Boardman v. Reed, 521.
 Bodwin v. Vandybendy, 347.
 Boehm v. Wood, 593, 595.
 Boesch v. Groff, 732, 793, 794, 795.
 Bogardus v. Trinity Church, 294, 301, 302, 303, 307, 308, 335, 356, 376.
 Bogert v. Bogert, 135.
 Bolton v. Gardner, 301, 303, 305, 342, 356, 376.
 Bondurant v. Watson, 79.
 Bone v. Missouri Iron Co., 164.
 Boone v. Boone, 786, 787.
 Boone v. Chiles, 346.
 Booth v. Clark, 603, 632, 645, 647, 648.
 Booth v. Leycester, 707.
 Bootle v. Blundell, 781, 787.
 Börs v. Preston, 144, 146, 252, 323.
 Boswell's Lessees v. Otis, 89, 771.
 Bostwick v. Bank of the United States, 741.
 Bostwick v. Brinkerhoff, 741.
 Bosworth v. Terminal Railroad Ass'n, 545, 661, 801.
 Botiller v. Dominguez, 244.
 Bouldin v. Massie, 485.
 Bowden v. Johnson, 649, 850.
 Bower v. Cross, 405.
 Bowers v. Smith, 254.
 Bowie v. Minter, 678, 684.
 Bowker v. Niekson, 821.
 Bowles v. Parsons, 664.
 Bowman v. Bowman, 225.
 Bowman v. Middleton, 777.
 Bowser v. Hughes, 326.
 Boyce v. Grundy, 13.
 Boyd v. Mills, 362, 364, 415.
 Boyd v. United States, 136, 139, 384.
 Boyer v. Boyer, 557.
 Boyle v. Zacharie, 11, 20, 539, 540, 715.
 Brace v. Taylor, 387.
 Bracken v. Union Pac. Ry. Co., 52.
 Bradford v. Fulsom, 328, 329.
 Bradford v. Union Bank, 430.
 Bradford v. Williams, 106.
 Bradley v. Rhines, 318.
 Bradley v. Steam Packet Co., 521.
 Brady v. Waldron, 581.
 Brandies v. Cochrane, 851.
 Brandlyn v. Ord, 347, 713.
 Brashear v. West, 337.
 Brasher v. Van Cortlandt, 774.
 Brashier v. Gratz, 164.
 Brassey v. New York & N. E. R. Co., 626.
 Brayton v. Smith, 597.
 Brereton v. Gamul, 359, 379.
 Brewster v. Wakefield, 860.
 Brickell v. City of New York, 792.
 Bridges v. Sheldon, 197.
 Brigham v. Luddington, 647.
 Brine v. Insurance Co., 79, 91.
 Brinkerhoff v. Brown, 274, 389.
 Brockett v. Brockett, 732, 785.
 Broderick Will Case, 247, 485.
 Bromley v. Child, 798.
 Bronson v. Keokuk, 53, 194, 196.
 Bronson v. La Crosse R. Co., 670.
 Bronson v. Railroad Co., 64, 65, 67, 741, 743.
 Brooks v. Byam, 377, 379, 380, 413, 414, 873.
 Brooks v. Farwell, 197.
 Brooks v. Gibson, 279.
 Brooks v. Greathead, 664.
 Brooks v. Railroad Co., 868.

References are to pages.

- Brooks v. Stolley, 182, 183, 184, 357.
 Broome v. New York & New Jersey Telephone Co., 537.
 Browder v. McArthur, 868.
 Brown v. Baxter, 742.
 Brown v. Brown, 345.
 Brown v. Buckley, 387.
 Brown v. Buena Vista County, 258, 552.
 Brown v. Colorado, 493.
 Brown v. Haff, 593, 595.
 Brown v. Higden, 678.
 Brown v. Huger, 520, 577.
 Brown v. Keene, 144, 146, 252.
 Brown v. King, 792.
 Brown v. Lake Superior Iron Co., 225, 652.
 Brown v. Martin, 156.
 Brown v. McConnell, 851, 852.
 Brown v. Newall, 431.
 Brown v. Pierce, 124, 371, 377, 379, 386.
 Brown v. Piper, 394, 395, 396, 492, 501.
 Brown v. Ricketts, 181, 819.
 Brown v. Union Bank, 742.
 Brown v. Wathen, 336.
 Browne v. Browne, 106.
 Brownsword v. Edwards, 361, 376.
 Bruecher v. Port Chester, 555.
 Brumley v. Manufacturing Co., 67.
 Buck v. Buck, 56, 186.
 Buck v. Colbath, 327, 551.
 Buck v. Lodge, 721.
 Buddicum v. Kirk, 452.
 Buffington v. Harvey, 732, 766.
 Bullock v. Gordon, 777.
 Buloid v. Miller, 413.
 Burnham v. Bowen, 665.
 Burgess v. Smith, 553.
 Burke v. Brown, 344, 345.
 Burke v. Miltenberger, 500.
 Burlington & Missouri R. Co. v. Thompson, 553.
 Burnell v. Duke of Wellington, 704.
 Burnham v. Bowen, 633, 654, 669, 750, 794, 801.
 Burnham v. Dolling, 739.
 Burroughs v. Oakley, 721.
 Burton v. Driggs, 486.
 Burton v. Ellington, 345.
 Bushnell v. Crooke Min. & Smelting Co., 868.
 Butler v. Kinzie, 391.
 Butz v. Muscatine, 79.
 Buzard v. Houston, 12, 148, 246.
 Byers v. McAuley, 12, 79, 91.
- C.
- Cade v. Cunningham, 469.
 Cæsar v. Capel, 721.
 Caha v. United States, 500.
 Cake v. Mohun, 638.
 Caldwell v. McFarland, 391.
 Caldwell v. Taggart, 68, 69.
 Calkins v. Bertrand, 873.
 Callaghan v. Myers, 570, 793, 795.
 Calmady v. Calmady, 786.
 Calpham v. Boyer, 334.
 Calson v. Morris, 392.
 Camden v. Mayhew, 774.
 Camden v. Stewart, 793, 795.
 Cameron v. Hodges, 13.
 Cameron v. McRoberts, 47, 732.
 Campbell v. Brown, 264.
 Campbell v. Campbell, 802.
 Campbell v. City of New York, 676.
 Campbell v. James, 869.
 Campbell v. Laclede Gas Co., 475.
 Campbell v. Lowe, 786, 787.
 Campbell v. Mesier, 739.
 Campbell v. Morris, 543.
 Campbell v. Rankin, 341, 472.
 Campbell v. Taul, 167.
 Campbell v. United States, 839.
 Candles v. Pettit, 679.
 Capen v. French, 676.
 Capon v. Miles, 345.
 Capron v. Van Noorden, 145, 146, 252.
 Carey v. Brown, 53, 54, 72.
 Carey v. Curtis, 10, 252.
 Carey v. Houston & Texas Central R. Co., 664, 843.
 Carleton v. Leighton, 326.
 Carneal v. Bank, 736.
 Carnochan v. Christie, 430.
 Carpenter v. Benson, 131.
 Carpenter v. Strange, 89, 470, 473, 771.
 Carr v. Duval, 164.
 Carr v. Fife, 149.
 Carr v. Gordon, 589.
 Carrington v. Holly, 707.
 Carter v. Burley, 498.
 Carter v. Roberts, 840, 841.
 Carter v. Treadwell, 325.
 Cartwright v. Hateley, 379.
 Cartwright v. Pultney, 786, 787.
 Cartwright's Case, 591.
 Caruthers v. Eldredge, 482.
 Case v. Kelly, 495.
 Casey v. Adams, 77, 90.
 Casey's Lessees v. Inloes, 509, 511.
 Castle v. Bullard, 514.
 Castro v. United States, 852, 853.
 Cavender v. Cavender, 24, 421.
 Central Nat. Bank v. Stevens, 328, 650.
 Central Nat. Bank of Baltimore v. Conn. Mut. Life Ins. Co., 423.
 Central R. Co. v. Central Trust Co., 748, 749.
 Central R. Co. v. Pettus, 872.
 Central Trust Co. v. Chattanooga, R. & C. R. Co., 625.
 Central Trust Co. v. Grant Locomotive Works, 270, 350, 728, 766.

References are to pages.

- Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 650.
 Central Trust Co. of New York v. McGeorge, 315.
 Chadbourne's Ex'rs v. Coe, 47, 48, 255.
 Chadwick v. Broadwood, 140, 384.
 Chaffee v. Quidnick Co., 553.
 Chaffin v. Hull, 169, 257.
 Chaffin v. Kimball, 223, 754.
 Chaires v. United States, 869.
 Chamberlain v. Agar, 334.
 Champlin v. Parish, 265.
 Chanoine v. Fowler, 498.
 Chapin v. Coleman, 388.
 Chapin v. Walker, 430.
 Chapman v. Barney, 13.
 Chappedelaine v. Dechenaux, 344, 345, 376.
 Chappell v. United States, 838, 840, 842.
 Chappell v. Waterworth, 147.
 Charlotte Nat. Bank v. Morgan, 315.
 Chase v. Cannon, 169, 257.
 Chase v. Curtis, 470.
 Chase's Case, 603, 607.
 Cheely v. Clayton, 504.
 Cheever v. Wilson, 493.
 Cheney v. Libby, 165.
 Cherokee Nation v. Georgia, 240.
 Cherry v. Clements, 391.
 Chester v. Life Ass'n of America, 674, 676, 682.
 Chester Iron Co. v. Beach, 135, 431.
 Chicago & Alton R. Co. v. Union Rolling Mill Co., 436, 709, 710.
 Chicago & Alton R. Co. v. Wiggins Ferry Co., 470, 498, 506.
 Chicago & Grand Trunk Ry. Co. v. Wellman, 580.
 Chicago & Northwestern R. Co. v. Ohle, 312, 320.
 Chicago & Vincennes R. Co. v. Fostick, 746, 749.
 Chicago, Burlington & Quincy R. Co. v. Iowa, 580.
 Chicago, Burlington & Quincy R. Co. v. Turrill, 755.
 Chicago Deposit Vault Co. v. McNulta, 634, 635.
 Chicago, etc. R. Co. v. Third Nat. Bank, 430.
 Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 580.
 Chicago, St. Paul, etc. R. Co. v. Roberts, 842.
 Chicago Union Bank v. Kansas City Bank, 611.
 Chicot v. Lequesne, 345, 376.
 Chicot County v. Sherwood, 278.
 Child v. Gibson, 338.
 Childress v. Emory, 324, 325.
 Chirac v. Reinicker, 324.
 Chisholm's Ex'rs v. Georgia, 4, 573.
 Cholmondeley v. Lord Clinton, 263.
 Christie v. Bishop, 388.
 Christie v. Christie, 167.
 Christmas v. Russell, 469.
 Christy v. Pidgeon, 79.
 Church v. Hubbard, 473, 498.
 Chute v. Dacre, 405.
 Cincinnati, etc. R. Co. v. McKeen, 847.
 Citizens' Bank v. Cannon, 873.
 City Bank v. Hunter, 860.
 City of Detroit v. Detroit City Ry. Co., 709, 710.
 Clapper v. House, 778.
 Clarion Bank v. Jones, 507.
 Clark v. Courtney, 480, 481.
 Clark v. Graham, 79, 91.
 Clark v. Hackett, 513.
 Clark v. Kansas City, 742.
 Clark v. Killian, 270, 350, 766.
 Clark v. Matthewson, 49, 109, 193, 434, 674, 676.
 Clark v. Periam, 533.
 Clark v. Phelps, 227, 228, 276, 307, 376.
 Clark v. Rayburn, 746, 748, 749.
 Clark v. Ridgely, 612.
 Clark v. Sewell, 515.
 Clark v. Smith, 247.
 Clark v. Tipping, 431.
 Clark v. Turton, 533.
 Clark v. White, 387.
 Clark's Ex'rs v. Van Riemsdyk, 385, 386, 388.
 Clarkson v. De Peyster, 720, 819.
 Clason v. Morris, 391.
 Clough v. Bond, 687.
 Clement v. Packer, 12, 79, 91.
 Clements v. Moore, 387, 422, 423.
 Clifton v. United States, 532.
 Clyde v. Richmond & D. R. Co., 784, 786.
 Coal Co. v. Blatchford, 106.
 Coal Co. v. McCreery, 827.
 Coates v. Mackey, 470.
 Cobb v. Jameson, 796, 802.
 Cochran v. McCleary, 589.
 Cocke v. Upshaw, 777.
 Coddington v. Pensacola & Ga. R. Co., 260.
 Coffee v. Grover, 499.
 Cohens v. Virginia, 2, 832, 840, 849.
 Coiron v. Millaudon, 44, 47, 48, 73, 255, 332, 726.
 Coke v. Bishop, 325.
 Coke v. Wilcox, 359, 415.
 Cole v. Cunningham, 553.
 Coleman v. Martin, 423.
 Colgate v. Campagnie, 129, 414.
 Collins v. Lovenberg, 678.
 Collins v. Thompson, 513.

References are to pages.

- Collis v. Collis, 720.
 Colorado Coal & Iron Co. v. United States, 506.
 Colson v. Thompson, 164.
 Colton v. Ross, 171, 777.
 Columbus Watch Co. v. Robbins, 845, 846.
 Colvin v. Jacksonville, 838, 841.
 Colvin, In re, 651.
 Comer v. Felton, 647, 770.
 Commercial Bank v. Reckless, 387.
 Commercial Ins. Co. v. Union Ins. Co., 386.
 Commissioners v. Lucas, 741.
 Commonwealth v. Gould, 603.
 Commonwealth v. Webster, 516.
 Compton v. Jessup, 109, 434, 664.
 Conard v. Atlantic Ins. Co., 324.
 Cone v. Cotton, 470.
 Connecticut v. Jackson, 818.
 Conner v. Drake, 710.
 Connolly v. Taylor, 175.
 Connor v. Featherston, 514.
 Conqueror, The, 848.
 Consequa v. Fanning, 487, 489, 802.
 Continental Life Ins. Co. v. Rhoads, 1, 13, 144, 145, 252, 323.
 Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 664, 827.
 Coody v. Gress Lumber Co., 481.
 Cook v. Mancius, 68.
 Cook v. Woodrow, 532.
 Cook County v. Calumet & Chicago Canal Co., 834.
 Coolidge v. Learned, 509, 512.
 Cooper v. Reynolds, 199, 469.
 Cooper v. Tappan, 391.
 Cooper v. Thornton, 664.
 Coosaw Mining Co. v. South Carolina, 540, 583.
 Copous v. Kauffman, 403.
 Corbett v. Nutt, 89, 553.
 Corbin v. Black Hawk County, 318.
 Corcoran v. Canal Co., 59.
 Core v. Strickler, 774.
 Cornell v. Warren, 338.
 Cornett v. Williams, 505.
 Corning v. Lowerrer, 583.
 Cornish v. Acton, 798.
 Cortes Co., The, v. Tannhauser, 49, 50, 109, 193, 434, 435, 451.
 Coryell v. Caine, 156.
 Cotter v. Ala. G. S. Co., 832, 833.
 Countess of Plymouth v. Bladon, 714.
 County of Tazwell v. Farmers' Loan & Trust Co., 174.
 County of Warren v. Marcy, 774.
 Couper v. Smyth, 589.
 Cowdry v. Railroad Co., 626, 628, 630, 633, 634, 638, 639, 828, 872.
 Cowslade v. Cornish, 798.
 Cox v. Davis, 481.
 Cox v. United States, 860.
 Coxe v. Smith, 786, 787.
 Cozine v. Graham, 264, 265, 266, 356.
 Crafts v. Clark, 470.
 Cragin v. Lovell, 80, 91.
 Craig v. McKinney, 344.
 Craig v. Smith, 766.
 Craighead v. Wilson, 741, 742, 802.
 Crane v. McCoy, 607.
 Cranstown v. Johnson, 768.
 Crawford v. Neal, 794, 795.
 Credit Co. v. Arkansas C. R. Co., 853.
 Credits Commutation Co. v. United States, 752.
 Creighton v. Kerr, 199, 200, 201.
 Crescent City & C. Co. v. Butchers' Union & C. Co., 277, 303, 330.
 Crespin v. United States, 496, 497.
 Crim v. Handley, 552.
 Crockett v. Lee, 148, 736.
 Crockford v. Alexander, 581.
 Cromwell v. Sac County, 341, 468.
 Crosby Steam Gauge & Valve Co. v. Consolidated Safety Valve Co., 819.
 Cross v. Allen, 12, 79, 91.
 Cross v. Cross, 508.
 Cross v. De Valle, 269, 426, 427, 429, 430, 436.
 Cross v. Evans, 845.
 Crouch v. Kerr, 283.
 Crouch, Ex parte, 551.
 Crow v. Wood, 626.
 Crowder v. Moone, 611.
 Crowder v. Tinkler, 583.
 Culver v. Uthe, 475.
 Cumming v. National Bank, 555, 557.
 Cunningham v. Macon & Brunswick R. Co., 576, 577.
 Cunningham v. Wegg, 353.
 Curling v. Marquis Townshend, 405, 407.
 Curran v. Campion, 169, 257.
 Currell v. Villars, 58, 484.
 Curtis v. Lord, 707.
 Curtis v. Masters, 418.
 Cuthbert v. Peacock, 515.
 Cutting, Ex parte, 752.
- D.
- Dade v. Irwin, 148, 246.
 Dagley v. Crump, 405.
 Dainese v. Hale, 498.
 Dale v. Madison, 388.
 Dale v. McEvers, 389.
 Dale v. Roosevelt, 777, 781.
 Daniel Ball, The, 578.
 Daniell v. Ballard, 388.
 Daniels v. Davison, 846.
 Darby v. Mayer, 484.
 Darby's Lessees v. Mayer, 58.
 D'Arcy v. Ketchum, 468, 469.
 Darcy's Ex'rs v. Cheney, 148, 258.

References are to pages.

- Darnell v. Reymer, 364, 415.
 Darston v. Earl of Oxford, 815.
 Darthez v. Lee, 345.
 Davie v. Briggs, 507.
 Davies v. Davies, 739.
 Davies v. Lathrop, 106.
 Davis v. Brown, 342, 472.
 Davis v. Cranch, 427.
 Davis v. Cripps, 232, 418.
 Davis v. Davis, 181.
 Davis v. Dee, 334.
 Davis v. Duke of Marlborough, 603.
 Davis v. Easley, 509.
 Davis v. Geissler, 838.
 Davis v. Gray, 576, 577, 603, 604, 632, 633, 641, 645, 646.
 Davis v. Mapes, 379, 382.
 Davis v. Prout, 254.
 Davis v. Schwartz, 794, 795.
 Davis v. Speiden, 766, 767.
 Davis v. Wakelee, 552.
 Davis and Rankin Building & Mfg. Co. v. Barber, 838.
 Dawson v. Amey, 487.
 Dawson v. Dawson, 344.
 Dawson v. Princeps, 542.
 Debs, In re, 540, 565, 566, 584, 587, 590, 591.
 Deckerhoff, In re, 9.
 Deery v. Crary, 520.
 Dehon v. Foster, 553.
 Deimel v. Brown, 387, 388.
 Deitzsch v. Huidekoper, 434.
 Delahanty v. Warner, 589.
 Delancy v. Seymour, 777.
 De Lane v. Moore, 532.
 Delany v. Mansfield, 603.
 Delaplaine v. Lawrence, 751.
 De la Torre v. Bernales, 411.
 De Neufville v. New York & N. Ry. Co., 174.
 Denison v. Bassford, 399.
 Denning v. Smith, 346.
 Depurton v. Young, 320, 322, 323.
 De Saussure v. Gillard, 835.
 Desmare v. United States, 503.
 De Sobry v. Nicholson, 311, 312, 313, 317.
 Despeaux v. Pennsylvania R. Co., 453.
 Devendorf v. Dicklason, 603.
 Devil v. Browlow, 330.
 Dewall v. Covenhoven, 254.
 Dewees v. Dewees, 437.
 Deweeze v. Reinhard, 549.
 De Witt v. Berry, 519.
 De Wolf v. Rabaud, 311, 312, 313, 317.
 Dexter v. Arnold, 69, 822, 823.
 Dias v. Merle, 678.
 Dick v. Hamilton, 388.
 Dick v. Swinton, 593, 597.
 Dickerson v. Colgrove, 549.
 Dickson v. Peppers, 198.
 Dickson v. Smith, 664.
 Didier v. Davison, 290, 293, 373.
 Dietzsch v. Huidekoper, 109, 550.
 Dillon v. Alvares, 328.
 Dillon v. Barnard, 278.
 Dinsmore v. Neresheimer, 553.
 Divina Pastora, The, 499.
 Dixon v. Astley, 720.
 Dixon v. Ramsey, 56, 253.
 Dixon v. Redmond, 410.
 Dixon v. Smith, 664.
 Dodd v. Daniel, 857.
 Dodge v. Israel, 454.
 Dodge v. Knowles, 853.
 Dodge v. Tulleys, 106, 146, 872.
 Dodge v. Woolsey, 61, 553.
 Dolder v. Bank of England, 405.
 Dormer v. Fortesque, 686.
 Dorsey v. Packard, 164.
 Douglas v. Butler, 74, 255.
 Douglass v. McChesney, 777.
 Douglass v. Mercedes, 820, 822, 825.
 Douglass v. Sherman, 698.
 Douison v. Mathews, 86, 87, 91.
 Dow v. Beidleman, 580.
 Dow v. Memphis & Little Rock R. Co., 623, 625, 629, 633.
 Dowell v. Applegate, 180, 282.
 Downe v. Lewis, 739.
 Downing, In re, 9.
 Dows v. Chicago, 553.
 Dows v. McMichael, 361, 362, 376.
 Dred Scott v. Sanford, 317.
 Drew v. Drew, 334.
 Drexel v. Berney, 549, 550.
 Drix v. Briggs, 301.
 Dublin Township v. Milford Savings Ass'n, 845.
 Du Bois v. Kirk, 573.
 Dubuque & Pacific R. Co., Ex parte, 731, 768.
 Duckworth v. Trafford, 612.
 Dudley, In re, 541.
 Dunbar v. Myers, 395.
 Duncan v. Dodd, 774.
 Duncan v. United States, 19.
 Dunham v. Eaton & H. R. Co., 148.
 Dunham v. Jackson, 391.
 Dunlap v. Gibbs, 156.
 Dunlap v. O'Dena, 802.
 Dunlap v. Stetson, 49, 109, 111, 193, 434.
 Dunn v. Clark, 49, 193.
 Dunnell v. Henderson, 822.
 Dunscombe v. Dunscombe, 819.
 Dupleix v. De Roven, 334.
 Duponti v. Mussy, 25, 182, 183, 357.
 Durant v. Essex Co., 338, 339, 869.
 Durant v. Ritchie, 509.
 Duryee v. Lingheimer, 430.
 Dwight v. Humphreys, 142.
 Dwyer v. Dunbar, 485, 533.

References are to pages.

E.

Earl v. Raymond, 328.
 Earl Cowper v. Baker, 581.
 Earle v. Southern Pac. Co., 104, 105.
 Earl of Derby v. Duke of Athol, 768.
 Earl of Kildare v. Eustace, 768.
 Earl of Mexborough v. Bower, 538.
 Earl of Oxford's Case, 553.
 Earl of Winchelsea v. Garrety, 777.
 Easley v. Kellom, 766.
 Eastburn v. Downes, 873.
 East India Co. v. Donald, 385, 387.
 East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co., 98, 99.
 Eastwood v. Vinck, 515.
 Eaton's Appeal, 391.
 Eberly v. Goff, 391.
 Eckert v. Banert, 439.
 Edgell v. Felder, 792.
 Edgerton v. Young, 431.
 Edmonson v. Bloomshire, 851.
 Edson v. Munsell, 509, 511.
 Edwards v. McLeary, 405, 407.
 Edwards v. United States, 199.
 Edge v. Robertson, 243, 244.
 E. I. Co. v. Keightly, 388.
 Eilenbecker v. Plymouth County Dist. Ct., 458, 591.
 Ekin v. United States, 833, 840, 841.
 Elliott v. Ray, 470.
 Eldred v. Michigan Ins. Bank, 201.
 Eldridge v. Knott, 509.
 Electric Accumulator Co. v. Brush Electric Co., 709.
 Ellenwood v. Marietta Chair Co., 80, 82, 88, 91.
 Ellis v. Boston, Hartford & Erie R. Co., 611.
 Ellis v. Davis, 485.
 Ellison v. Cookson, 515.
 Ellsworth v. Curtis, 366.
 Elmendorf v. De Lacy, 142.
 Elwell v. Forsdick, 59.
 Elwell v. Hinckley, 509.
 Elwood v. Flannigan, 493.
 Ely v. James, 405.
 Ely v. New Mexico & Arizona Ry. Co., 158, 372.
 Embre v. Hamed, 328.
 Emerson v. Davies, 715, 730.
 Emerson v. Harland, 334.
 Emery's Case, 383.
 Empire City Bank, In the Matter of, 630.
 Empire Distilling Co. v. McNulta, 669, 670, 794, 801.
 Endo v. Caleham, 345.
 England v. Downs, 254.
 Ennis v. Holmead, 498.
 Ennis v. Smith, 473, 474.
 Enos v. Capps, 223, 754.
 Ensminger v. Powers, 270, 350, 766.

Ensworth v. Lambert, 68, 687.
 Entick v. Carrington, 136, 383.
 Erb v. Morash, 636, 642.
 Erhardt v. Boaro, 581.
 Erie Ry. Co. v. Ramsey, 553.
 Estes v. Trabue, 857.
 Eubank v. Wright, 796, 802.
 Eustes v. Bolles, 835.
 Evans v. Davenport, 311, 313.
 Evans v. Evans, 597.
 Evans v. Gee, 311, 312, 313, 317.
 Evans v. Harris, 337.
 Evans v. State Bank, 854, 857.
 Evansville Bank v. Britton, 557.
 Everet v. Watts, 305, 306, 376.
 Everhart v. Huntsville College, 178.
 Ewing v. Burnett, 509.

F.

Fales, Adm'r, v. Chicago, M. & St. P. Ry. Co., 101.
 Fallowes v. Williamson, 703.
 Farley v. Kittson, 289, 291, 304, 305, 354, 360, 373, 375.
 Farmers' Loan & Trust Co. v. Central R. Co., 795.
 Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 59, 629.
 Farmers' Loan & Trust Co. v. Lake Street Elev. Co., 328, 650.
 Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 61, 653, 654.
 Farmers' Loan & Trust Co. v. Railway Co., 633.
 Farmers' Loan & Trust Co. v. Seymour, 687, 700.
 Farmers' Loan & Trust Co., Petitioners, 658, 750, 751.
 Farmington v. Pillsbury, 311, 312, 313, 319, 320.
 Farrar v. Churchill, 514, 850, 851.
 Farrar v. United States, 199.
 Farrington v. Chute, 345.
 Fawcett v. Fothergill, 664.
 Fawkes v. Pratt, 142, 326.
 Felch v. Hooker, 795.
 Fellows v. Fellows, 169, 257, 542.
 Fenn v. Holme, 148, 246, 539.
 Fenwick v. Sears' Adm'rs, 253.
 Fest v. Union Pac. R. Co., 550.
 Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co., 550.
 Fidelle v. Evans, 708.
 Field v. Beaumont, 581.
 Field v. Holland, 794.
 Field v. Schieffelin, 269, 432, 433.
 Fife v. Clayton, 430.
 Finance Co. v. Charleston, C. & C. R. Co., 633, 655, 665, 794, 801.

References are to pages.

- Finance Committee v. Warren, 791, 792.
 Finch v. Lord Winchelsea, 703, 704.
 Finchman v. Hobbs, 334.
 Findlay v. Hinde, 143.
 Finley v. Bank of United States, 68.
 Fire Insurance Ass'n v. Wickham, 845.
 First Nat. Bank v. Moore, 169, 257.
 First Nat. Bank of Cleveland v. Shedd, 59.
 Fischer v. Hayes, 791.
 Fischer v. Wilson, 423.
 Fish v. Miller, 131, 301, 356.
 Fish, Ex parte, 459.
 Fishback v. Western Union Tel. Co., 13, 144, 252, 310, 313, 323.
 Fisher v. Hayes, 447.
 Fisk v. Henarie, 832.
 Fisk v. Union Pac. R. Co., 550.
 Fitzgerald v. Buck, 347.
 Fitzgerald v. Falconbridge, 347.
 Fitzgerald & M. Const. Co. v. Fitzgerald, 197, 199, 200, 315.
 Fitzhugh v. Croghan, 481.
 Flagg v. Mann, 387.
 Fletcher v. Fuller, 509, 512.
 Fletcher v. Morey, 11, 539.
 Fletcher v. Wilson, 429.
 Flint v. Rives, 116.
 Flock v. Holm, 593.
 Florentine v. Barton, 505.
 Florida v. Georgia, 660.
 Fogg v. Blair, 278.
 Folsom v. Evans, 606.
 Foote v. Cobb, 481.
 Foote v. Silsby, 666, 798, 807.
 Forbes v. Railroad Co., 64, 67, 665, 670.
 Forbes v. Whitlock, 61.
 Ford v. Douglass, 430.
 Forgay v. Conrad, 30, 741, 742, 802, 805.
 Fornshill v. Murray, 777.
 Forsyth v. Hammond, 848.
 Forsyth v. Pierson, 53, 194, 196.
 Forsythe v. Kimball, 519.
 Fosdick v. Schall, 620, 625, 626, 629, 630, 633, 651, 654, 664, 665, 669, 750, 752, 794, 801.
 Foster v. Cleveland, C. & St. L. Ry. Co., 322, 323.
 Foster v. Deacon, 680.
 Foster v. Donald, 721.
 Foster v. Foster, 405.
 Foster v. Goddard, 148.
 Foster v. Mansfield, C. & L. M. R. Co., 260.
 Foster v. Neilson, 243, 499.
 Foster v. Vassall, 330.
 Fourniquet v. Perkins, 727, 827.
 Fouvergne v. City of New Orleans, 485.
 Fowler v. Morrill, 508.
 Frances v. Hazelrig, 480.
 Francis v. Flynn, 148, 246.
 Frank v. Denver & R. G. Ry. Co., 650.
 Franklin v. Meyer, 802.
 Freeland v. Cocke, 807, 811, 812.
 Freeman v. Fairles, 382.
 Freeman v. Howe, 49, 109, 193, 328, 434, 551.
 Fremont v. Merced Min. Co., 311, 312.
 Fremont v. United States, 496, 497, 501.
 French v. Gapen, 665.
 French v. Griffin, 430.
 French v. Hoy, 174, 550.
 French v. Shotwell, 304.
 French v. Stewart, 25, 191, 224.
 Fresh v. Gilson, 502, 532.
 Frost v. Spitley, 247.
 Frow v. De La Vega, 210, 211, 225, 391.
 Fryrear v. Lawrence, 387.
 Fulkerson v. Holmes, 482.
 Fulton Bank v. Beach, 406.
 Furber v. Ferris, 794.
 Furman v. Nichol, 493.
 Furnace Co. v. Charleston, C. & C. R. Co., 669.
- G.
- Gableman v. Peoria Ry. Co., 642.
 Gadd v. Worrall, 542.
 Gage v. Kaufman, 156, 158.
 Gage v. Pumpelly, 79, 91.
 Gaines v. Agnelly, 375, 377, 384.
 Gaines v. Chew, 169, 171, 257, 485.
 Gaines v. Dunn, 508.
 Gaines v. Fuentes, 552.
 Gaines v. Hennen, 486, 508.
 Gaines v. Mausseaux, 291, 356.
 Gaines v. New Orleans, 821.
 Gaines v. Nichols, 514.
 Gaines v. Rugg, 731, 768, 869.
 Gainsborough v. Gifford, 405.
 Galatian v. Erwin, 346.
 Galliher v. Caldwell, 258, 259.
 Galt v. Carter, 777.
 Galveston, H. & S. A. R. Co. v. Gonzales, 201.
 Galveston R. Co. v. Cowdrey, 58, 623, 633, 658.
 Gamewell Fire Alarm Tel. Co. v. The Mayor, 129, 414.
 Garcia v. Lee, 243, 499.
 Gardner v. Collector, 501.
 Gardner v. —, 598.
 Garlick v. Strong, 274.
 Garner v. Second Nat. Bank, 513, 550, 709.
 Garrett v. White, 786, 787.
 Garsed v. Beall, 781.
 Garstin v. Asplin, 581.

References are to pages.

- Gason v. Wadsworth, 446.
 Gass v. Stinson, 465, 799.
 Gates v. Goodloe, 850.
 Gelston v. Hoyt, 499.
 Georgetown v. Alexandria Canal Co., 583.
 Georgia v. Brailsford, 540.
 Georgia v. Stanton, 240, 243.
 Germain v. Mason, 860.
 Getman v. Beardsley, 873.
 Giant Powder Co. v. Cal. Vigorit Powder Co., 276, 730, 739.
 Giant Powder Co. v. Safety Nitro Powder Co., 291.
 Gibert v. Colt, 593.
 Gibson v. Whitehead, 293.
 Giffard v. Hart, 686.
 Gildersleeve v. New Mexico Mining Co., 258.
 Giles v. Baremore, 502.
 Gilfillan v. McKee, 860.
 Gillett v. Robbins, 156.
 Gillette v. Bate Refrigerating Co., 730.
 Gillis v. Downey, 730.
 Gillis v. Stinchfield, 835.
 Gilman v. Illinois & Miss. Tel. Co., 622.
 Gilman v. Philadelphia, 582.
 Gilman v. Rives, 324.
 Gilmer v. City of Grand Rapids, 317.
 Glasscock v. Hughes, 509.
 Glassington v. Thwaites, 366.
 Gleason v. Bisby, 593, 597.
 Glengal v. Frazer, 379.
 Glenn v. Dimmock, 732.
 Glenn v. Noonan, 732.
 Glover v. Tuck, 160, 161.
 Glynn v. Bank of England, 441, 442.
 Goddard v. Mailer, 98, 99.
 Godden v. Kimmell, 336.
 Godfrey v. Terry, 146, 252.
 Gold v. Canham, 721.
 Gold Washing & Water Co. v. Keyes, 840.
 Goldey v. Morning News, 201.
 Gomme v. West, 661, 664.
 Gonzales v. Cunningham, 833.
 Goodhue v. Churchman, 225.
 Goodlet v. Railroad Co., 101.
 Goodman v. Niblack, 108, 196.
 Goodner v. Browning, 815.
 Goodrich v. Pendleton, 290, 291, 335, 373, 376.
 Goodwin v. Clark, 595.
 Goodwin v. Fox, 448.
 Goodwin v. Goodwin, 678.
 Goodyear v. Prov. Rubber Co., 715.
 Goodyear Dental V. Co. v. Fulsom, 542.
 Gordon v. Bertram, 704.
 Gordon v. Gordon, 533.
 Gordon v. Hobart, 795.
 Gordon v. Lewis, 821.
 Gormley v. Bunyan, 467, 493.
 Gormley v. Clark, 10, 12, 79, 91, 246, 247.
 Goss v. Tracy, 481.
 Gould v. Day, 508.
 Grace v. Am. Cent. Ins. Co., 13.
 Gracie v. Palmer, 111, 199, 200, 315.
 Graeme v. Harris, 56.
 Graffman v. Burgess, 176.
 Grafton v. Cumming, 337.
 Graham v. Chapman, 388.
 Graham v. Coape, 366.
 Graham v. Mason, 372.
 Graham v. Meyer, 332.
 Graham v. Tankersley, 269, 430.
 Graham, Ex parte, 653.
 Grand Chute v. Winegar, 549.
 Grant v. Grant, 593.
 Grant v. Phoenix Life Ins. Co., 68, 610, 650.
 Grant v. Stone, 631.
 Grant v. United States Bank, 388.
 Grant v. Van Schoonhoven, 254, 401.
 Grattan v. Appleton, 873.
 Graves v. Boyle, 515.
 Graves v. Corbin, 170.
 Gray v. Brignardello, 739.
 Gray v. Chicago, Iowa & N. R. Co., 541, 592.
 Grayson v. Virginia, 715.
 Great Falls Manufacturing Co. v. Worster, 553.
 Great Western Telegraph Co. v. Burnham, 742.
 Greeley v. Lowe, 108, 194, 196.
 Greeley v. Smith, 674.
 Green v. Bishop, 822, 823.
 Green v. Bogue, 338, 356, 357, 360, 420.
 Green v. Chicago, etc. R. Co., 869.
 Green v. Elbert, 167, 854.
 Green v. Hart, 387.
 Green v. Hayman, 325.
 Green v. Van Buskirk, 469.
 Greenaway v. Adams, 799.
 Greenhill v. Church, 345.
 Greenleaf v. Queen, 136, 383, 676, 698.
 Greenough v. Gaskell, 384.
 Greenwood v. Atkinson, 405.
 Gregory v. Boston Safe Deposit Co., 721, 867.
 Gregory v. Molesworth, 338.
 Gregory v. Pike, 193, 434, 435, 709.
 Gregory v. Stetson, 42, 43, 44, 726.
 Gregory v. Van Ee, 843.
 Grether v. Cornell's Ex'rs, 283.
 Griffith v. Bateman, 325.
 Grignon v. Astor, 505.
 Grigsby v. Purcell, 853.
 Grim v. Wheeler, 381.
 Grimstone v. Carter, 346.
 Grisar v. McDowell, 577.
 Griswold v. Hazard, 596, 597.

References are to pages.

- Grosholz v. Newman, 148.
 Grosvenor v. Cartwright, 389.
 Grover v. Faurot, 845.
 Grover & B. Sewing Machine Co. v. Radcliffe, 469.
 Groves v. Corbin, 257.
 Grundy v. Masters, 720.
 Guaranty, Trust & Safe Deposit Co. v. Green Cove Springs & Melrose R. Co., 52, 196.
 Guilbert v. Howles, 707.
 Guion v. Liverpool, London, etc. Ins. Co., 752.
 Gumble v. Pitken, 109, 434.
 Gun v. Prior, 334.
 Gurnee v. Patrick County, 842.
 Gwyn v. Leibridge, 430.
- H.**
- Habich v. Folger, 199.
 Hagan v. Walker, 68.
 Hager v. Thompson, 513.
 Hagerman v. Moran, 756.
 Haggarty v. Pittman, 608.
 Hagner v. Heyberger, 589.
 Hagood v. Southern, 576.
 Hahn v. Harwood, 395.
 Haines v. Beach, 68, 69.
 Halderman v. Halderman, 213.
 Hale v. Continental Life Ins. Co., 208.
 Hale v. Frost, 620, 625, 633, 654, 665, 669, 794, 801.
 Halkirk v. Halkirk, 708.
 Hall v. Cont. Life Ins. Co., 397.
 Hall v. De Cuir, 578.
 Hall v. Maltby, 533.
 Halliday v. McDougall, 498.
 Halsey v. Cheney, 258.
 Halstead v. Buster, 12, 79, 91.
 Halstead v. Grinnan, 258, 260.
 Hamilton v. Walsh, 550.
 Hamilton v. Worsefold, 581.
 Hamlin v. Trust Co., 752.
 Hamlyn v. Lee, 661, 664.
 Hammersly v. Baker, 873.
 Hammond v. Hopkins, 258.
 Hampton v. McConnell, 469.
 Hancock v. Holbrook, 144, 145, 252.
 Handford v. Storie, 707.
 Handsard v. Hardy, 713.
 Handy v. Cleveland & M. R. Co., 651.
 Hangerford v. Sigerson, 549.
 Hankey v. Simpson, 344.
 Hanley v. Donoghue, 469, 470, 493, 495, 499.
 Hannay v. McEntire, 593.
 Hanrick v. Neely, 508.
 Hanrick v. Patrick, 12, 79, 480, 481, 860.
 Hanrier v. Moulton, 258.
 Hardee v. Wilson, 857, 858, 859.
- Hardeman v. Harris, 379, 384.
 Hardin v. Baird, 388.
 Hardin v. Boyd, 177, 408.
 Hardin v. Jordan, 12.
 Harding v. Handy, 47, 736, 815, 817, 822.
 Harding v. Harding, 774.
 Hardingham v. Nichols, 347.
 Hardman v. Ellames, 293, 301.
 Hardway v. Eliot Nat. Bank, 385.
 Hardwicke v. Vernon, 382.
 Hardy v. McClellan, 611.
 Hare v. Collins, 777.
 Hargrove v. Martin, 391.
 Harkness v. Hyde, 197, 200.
 Harkrader v. Wadley, 328, 551, 589.
 Harlan v. Howard, 482.
 Harpending v. Reformed Dutch Church, 309, 335, 376.
 Harper v. Norfolk & W. R. Co., 106.
 Harris v. Fly, 346.
 Harris v. Harris, 334.
 Harris v. Ingledew, 347, 376.
 Harris v. Wall, 451.
 Harrison v. Morton, 834, 835.
 Harrison v. Nixon, 148, 178, 763.
 Harrison v. Perea, 872.
 Harrison v. Ridley, 698.
 Harrison v. Rowan, 786.
 Harson v. Gardiner, 581.
 Hart v. Meddlehurst, 347.
 Hart v. Rose, 160.
 Hart v. Sanson, 89, 753, 771.
 Hart v. Ten Eyck, 387, 391, 422, 666, 796, 798.
 Harteau v. Harteau, 504.
 Harter v. Kernochan, 71.
 Hartog v. Memory, 319, 320, 321.
 Harvey v. Tyler, 505.
 Harwood v. Cincinnati & C. A. L. R. Co., 258.
 Harwood v. Railroad Co., 552.
 Haskin v. St. Louis & S. E. Ry. Co., 855.
 Hassam v. Day, 786, 787.
 Hat-Sweat Mfg. Co. v. Waring, 709.
 Hatch v. Bancroft-Thompson Co., 283, 355.
 Hatch v. Dorr, 109, 193, 434.
 Hatch v. Spofford, 328, 330.
 Hawes v. Contra Costa Water Co., 63, 174.
 Hawley v. Bennett, 546.
 Hawley v. Wolverton, 116, 118, 119, 126, 149, 151, 159, 166, 233, 306, 370.
 Hawtry v. Trollop, 361, 376.
 Hayalle v. Texas & Pacific R. Co., 857.
 Hayden v. Thompson, 169.
 Hayes v. Fischer, 831.
 Hays v. Pratt, 56.
 Hayward v. Andrews, 148, 246.
 Hayward v. Eliot Nat. Bank, 258.
 Hazard v. Durant, 290, 291, 373, 647.

References are to pages.

- Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., 676, 677, 683, 684.
 Heartt v. Corning, 305, 354.
 Heath v. Railway Co., 174.
 Heine v. Levee Com'rs, 245, 539.
 Heirs of Wilson v. Insurance Co., 857.
 Hellam v. Graves, 338.
 Hemmenway v. Fisher, 756.
 Hemsley v. Myers, 550.
 Henderson v. Carbondale Coal & C. Co., 502, 503, 729.
 Henderson v. Griffin, 79.
 Hendricks v. Bradley, 422.
 Hendrickson v. Bradley, 712.
 Hendrickson v. Hinckley, 552.
 Hendy v. Golden State & Miners' Iron Works, 395.
 Henn v. Wash, 609.
 Hennessee v. Ford, 391, 392.
 Hennessey v. Woodworth, 164.
 Henpert v. Benn, 344.
 Henry v. Bishop, 481.
 Henry v. Travelers' Ins. Co., 186.
 Hepburn v. Auld, 165.
 Hepburn v. Dunlop, 162.
 Herman v. Fisher, 611.
 Herring v. Rogers, 483.
 Hershberger v. Blewett, 709.
 Hervy v. Smith, 537.
 Heussey v. Sheldon, 756.
 Hewitt v. Filbert, 852, 853, 854.
 Hewlet v. Cock, 482.
 Heyn v. Heyn, 801.
 Hicks v. Hogan, 802.
 Hicks v. Worcester, 555.
 Highland Ave. R. Co. v. Equipment Co., 868.
 Higinbotham v. Burnet, 275.
 Hilchens v. Lander, 334.
 Hill v. Exchange Bank, 557.
 Hill v. Mendenhall, 199, 200.
 Hill v. Railroad Co., 857.
 Hill v. Ryan Grocery Co., 430.
 Hillary v. Waller, 509.
 Hilton v. Guyot, 470, 471.
 Hilton v. Morgan, 787.
 Hinchman v. Kelley, 260, 336.
 Hinckley v. Gilman, etc. R. Co., 753.
 Hinckley v. Railroad Co., 638, 648.
 Hind v. Case, 429.
 Hipp v. Babin, 12, 148, 246.
 Hitz, Ex parte, 501.
 Hobbs v. M. & C. R. Co., 499.
 Hodgson v. Bowerbank, 146.
 Hogan v. Kurtz, 486.
 Hogan v. Walker, 54, 55.
 Hohorst v. Hamburg-American Packet Co., 842.
 Hohorst, Re, 104, 192.
 Holden v. Trust Co., 755.
 Holland v. Challen, 247.
 Hollingsworth v. Barbour, 89, 771.
 Hollingsworth v. Virginia, 574.
 Hollis v. Brierfield Coal & Iron Co., 868.
 Holman v. Norfolk Bank, 156.
 Holt v. Indiana Mfg. Co., 841.
 Hood v. Inman, 165, 166.
 Hooe v. Jamieson, 100.
 Hooe v. Werner, 100.
 Hooper v. Scheimer, 246.
 Hopkins v. Canal Proprietors, 608.
 Hopkins v. Lee, 333, 463.
 Hopper v. Hopper, 372.
 Horn v. Detroit Dry Dock Co., 420.
 Horner v. United States, 840, 841.
 Hornthall v. Keary, 146, 252.
 Hornthall v. The Collector, 873.
 Horsburg v. Baker, 136, 383.
 Horton v. Critchfield, 470.
 Hostetter Co. v. E. G. Lyons Co., 289, 292, 373.
 Hough v. Williams, 799.
 Houlditch v. Marquis of Donegal, 533.
 House v. Mullen, 73, 148, 332, 339.
 Hovey v. Elliott, 213, 222, 409.
 Hovey v. McDonald, 216, 222, 649.
 Howard v. Railway Co., 770.
 Howard v. Schwedes, 704.
 Howard v. Snelling, 481.
 Howden v. Rogers, 593.
 Howell v. Western R. Co., 746, 749.
 Howes v. Victoria Copper Mining Co., 736.
 Howland v. Edmonds, 160.
 Howlett v. Wilbraham, 403.
 Hoxie v. Carr, 676.
 Hoyden v. Thompson, 257.
 Hoyt v. Russell, 499.
 Hubbard v. Soby, 832.
 Hudson v. Guestier, 868.
 Hudson v. Puett, 481.
 Hudson v. Randolph, 277.
 Huet v. Lord Say & Seal, 698.
 Huggins v. York Building Co., 703.
 Hughes v. Blake, 309, 338, 341, 360, 376, 385.
 Hughes v. Bloomer, 405.
 Hughes v. Edwards, 336.
 Hughes v. Garth, 347.
 Hughes v. People, 819.
 Hughes v. United States, 282, 338, 339, 714.
 Huidekoper v. Locomotive Works, 654.
 Humbert v. Trinity Church, 260, 261.
 Humes v. Scruggs, 24, 421.
 Humiston v. Stainthorp, 741.
 Humphrey v. Baker, 869.
 Humphreys v. Humphreys, 678.
 Hunn v. Norton, 819.
 Hunt v. Danford, 332.
 Hunt v. Priest, 661, 664.
 Hunt v. Rousmaniere, 176, 180, 272, 282, 364, 408, 518, 678.
 Hunt v. Stephenson, 388.

References are to pages.

Huntington v. Attrill, 470.
 Huntington v. Laidley, 277, 303, 338.
 Huntington v. Palmer, 174.
 Huntley v. Whittier, 503.
 Hurd v. Case, 269.
 Hurd v. Everett, 174, 185.
 Hurdit v. Calladon, 334.
 Hurt v. Hollingsworth, 36.
 Hutchins v. King, 581.
 Hutchinson v. Reed, 187, 366.

I.

I. & G. N. Ry. Co. v. McRae, 481.
 Idaho & Oregon Land Co. v. Bradbury, 780.
 Ilett v. Collins, 260.
 Illinois C. R. Co. v. Brown, 842.
 Imperial Refining Co. v. Wyman, 312, 317, 321.
 Improvement Co. v. Munson, 516.
 Indiana, etc. R. Co. v. Liverpool, etc. Ins. Co., 433.
 Indianapolis Gas Co. v. City of Indianapolis, 131, 135.
 Ingle v. Jones, 447.
 Inglee v. Cooledge, 873.
 Inglehart v. Stansbury, 857, 858, 859.
 Insurance Co. v. Bailey, 549.
 Insurance Co. v. Brune, 326.
 Insurance Co. v. Cammet, 70.
 Insurance Co. v. Harris, 469.
 Insurance Co. v. Huchbergers, 756.
 Insurance Co. v. Myer, 388.
 Insurance Co. of North America v. Svendsen, 175, 179.
 Interior Const. & Imp. Co. v. Gibney, 111, 200, 315, 338.
 International & Great Northern Ry. Co. v. Rathbone, 480.
 Interstate Commerce Commission v. Brimson, 591.
 Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 245.
 Interstate Land Co. v. Maxwell Land Co., 278.
 Int. St. Com. Comm'n v. Atchison, etc. R. Co., 832.
 Iowa County v. Mineral Point R. Co., 156, 158.
 Irving v. De Kay, 423.
 Irwin v. San Francisco Sav. Union, 520.
 Ives v. Medcalf, 517.
 Iveson v. Harris, 542.

J.

Jackson v. Ashton, 146, 148, 252.
 Jackson v. Chamberlain, 481.
 Jackson v. Gager, 481.

Jackson v. Grant, 269, 430.
 Jackson v. Kingsley, 483.
 Jackson v. Laroway, 482.
 Jackson v. Luquere, 482.
 Jackson v. Parish, 405.
 Jackson v. Petrie, 593.
 Jackson v. Rowe, 347.
 Jackson v. Twentymen, 146.
 Jackson v. Waldron, 480, 481.
 Jacob v. Hall, 411.
 Jacobs v. George, 854.
 Jacobs v. Richard, 430.
 Jared v. Saunders, 347, 376.
 Jarvis v. Palmer, 275.
 Jaunce v. Thorne, 484.
 Jay v. Adelbert College, 842.
 Jenkins v. Banning, 756.
 Jenkins v. Eldredge, 730, 731, 799.
 Jenkins v. Jenkins, 608.
 Jenks v. Quidnick Co., 12.
 Jennings v. Merton College, 405.
 Jerome v. McCarter, 68, 658.
 Jerrard v. Saunders, 379.
 Jersey City v. City of Hudson, 583.
 Jessup v. Illinois Cent. R. Co., 437.
 Jesup v. Hill, 597.
 Jesup v. Wabash, St. L. & P. Ry. Co., 792.
 Jesus College v. Gibbs, 372.
 Jewell v. Knight, 845, 847.
 Joeffrey v. Brown, 822.
 Johnson v. Aston, 720.
 Johnson v. Butler, 431.
 Johnson v. Christian, 1, 252, 552.
 Johnson v. Day, 198.
 Johnson v. Everett, 745, 802.
 Johnson v. Harmon, 781, 785.
 Johnson v. Keith, 742.
 Johnson v. Powers, 56.
 Johnson v. Risk, 835.
 Johnson v. Stewart, 824.
 Johnson v. Vail, 156.
 Johnson v. Vance, 156.
 Johnson v. Waters, 199, 552, 827.
 Johnson R. S. Co. v. Union S. & S. Co., 269, 429, 434, 435.
 Johnson Steel Street Rail Co. v. North Branch Street Co., 456.
 Johnston v. Standard Min. Co., 260.
 Jones v. Alephsin, 593.
 Jones v. Anderson, 49, 193, 434.
 Jones v. Andrews, 109, 199, 200.
 Jones v. Bassett, 681.
 Jones v. Brittan, 423.
 Jones v. Douglass, 802.
 Jones v. Jones, 686.
 Jones v. Keen, 822.
 Jones v. Lamar, 822.
 Jones v. League, 311, 312, 313, 317.
 Jones v. Pugh, 384.
 Jones v. Sampson, 593.
 Jones v. Scholl, 611, 612.
 Jones v. Thomas, 347, 799.

References are to pages.

Jones v. Tuberville, 388.
Jones v. United States, 499, 501.
Jones, Ex parte, 103.
Jones & Laughlin v. Sands, 752.
Joseph v. Tuckey, 326.
Joy v. St. Louis, 622, 625, 664.
Junction R. R. Co. v. Bank of Ash-
land, 493, 495.
Juneau Bank v. McSpedan, 197.

K.

Kable v. Mitchell, 774.
Kamm v. Stark, 194.
Kamshire v. Young, 345, 376.
Kane v. Bloodgood, 261, 334.
Kane v. Paul, 324, 325.
Kane v. Whittick, 745.
Kauffman v. Kennedy, 197.
Kaukauna Water Power Co. v. Green
Bay & M. Canal Co., 12.
Kay v. Marshall, 293.
Keane v. McDonough, 499.
Keasby, Re, v. Mattison Co., 99, 100,
101, 104, 105, 111, 146, 252.
Keely v. Sanders, 506.
Keenland v. Luce, 59.
Keller v. Oceana, 156.
Kelley v. Boettcher, 130, 167, 169, 257.
Kelley v. Eckford, 135.
Kelsall v. Bennet, 347.
Kemp v. Kennedy, 505.
Kemp's Lessees v. Kennedy, 3.
Kempner v. Churchill, 514.
Kendall v. Creighton, 54, 55.
Kender v. Jones, 581.
Kendig v. Dean, 47, 73, 255, 332, 339.
Kennedy v. Bank of Georgia, 270,
350, 676, 766.
Kennedy v. Creswell, 361, 376.
Kennedy v. St. Paul & P. Ry. Co., 626,
628, 629, 630, 631, 636, 658.
Kennessley v. Simpson, 334.
Kennett v. Chambers, 499.
Kent v. Iron Co., 59.
Kent v. Kent, 706.
Keokuk & W. R. Co. v. State of Wis-
consin, 341, 468.
Kerr v. Moon, 56, 79, 91.
Kerr v. South Park Com'rs, 786.
Kerrison v. Stewart, 53, 54, 59.
Kershaw v. Thompson, 768, 771, 774,
775.
Keyser v. Rice, 553.
Keystone Iron Co. v. Martin, 740, 741,
842.
Kilbourn v. State Savings Institu-
tion, 756.
Kilbourn v. Sunderland, 13, 148, 246.
Killian v. Ebbinghaus, 12, 148, 246,
869.
Kilpatrick v. Love, 387, 798.

Kimberly v. Arms, 793, 794, 795, 869.
Kimberly v. Sells, 275.
King v. Bryant, 891.
King v. Donnelley, 609.
King v. Gallun, 492.
King v. Hamilton, 164.
King v. Ray, 381.
King v. Thompson, 164.
King Iron Bridge & Mfg. Co. v.
County of Otoe, 144, 178, 252.
Kingman v. Western Mfg. Co., 842.
Kingsbury v. Buckner, 269, 429, 754.
Kinsey v. Kinsey, 338.
Kirby v. Tallmadge, 347, 516.
Kirby v. Taylor, 359.
Kirk v. Du Bois, 873.
Kirk v. Hamilton, 549.
Kirkman v. Andrews, 326.
Kirkman v. Hamilton, 337.
Kirwan v. Murphy, 849, 868.
Kittridge v. Claremont Bank, 130,
379, 414.
Knapp v. Abell, 470.
Kneeland v. American Loan & Trust
Co., 633, 655, 751.
Kneeland v. Bass Foundry & Mach.
Works, 633, 655.
Kneeland v. Luce, 658.
Knickerbocker v. De Freest, 402.
Knickerbocker v. Harris, 387.
Knight v. Bee, 325.
Knowles v. Gas Light & Coke Co.,
469.
Knox v. Summers, 199.
Knox Co. v. Harshman, 149.
Koehler v. Black River Falls Iron
Co., 61.
Koehler, Ex parte, 650.
Kohn v. McNulta, 784.
Kountz v. Omaha Hotel Co., 610, 623.
Krueger v. Ferry, 269, 429.
Kuppendorf v. Hyde, 664, 665.
Kuypers v. Reformed Dutch Church,
279.

L.

Lacassangue v. Chaupis, 774.
Lackawana Co. v. Farmers' Loan &
Trust Co., 665, 669, 794, 801.
Lacon v. Briggs, 334.
Lacon v. Lacon, 334.
Lady Stowell v. Cole, 706.
La Fayette Co. v. Neely, 149.
Lafayette Ins. Co. v. French, 146.
Laight v. Morgan, 143, 275.
Lamar v. Micou, 493.
Lamb v. Ewing, 109, 194, 434.
Lambert v. Barrett, 842.
Landes v. Brant, 347.
Landsdown v. Elderton, 774.
Langdale v. Langdale, 708.
Langdon v. Goddard, 143, 167.

References are to pages.

- Langton v. Higgs, 721.
 Lansdale v. Smith, 258.
 Lane v. Newdigate, 537.
 Lapeyre v. United States, 500, 516.
 Larkin v. Mann, 401.
 Larned v. Griffin, 197.
 Lardner v. Ogden, 437.
 Lashley v. Hogg, 708.
 Last Chance Mining Co. v. Tyler Mining Co., 341, 468.
 Latta v. Kilbourn, 806, 827.
 Lau Ow Bew v. United States, 832, 836, 841, 847.
 Lau Ow Bew, Petitioner, 847.
 La Vega v. Lapsley, 30, 415, 416.
 Law v. Ford, 609.
 Lawber v. Bangs, 162, 163.
 Lawrence v. Greenwich Fire Ins. Co., 609.
 Lawrence v. Lawrence, 387.
 Lawrence v. Remington, 328.
 Lawrence v. Richmond, 739.
 Lazus v. Lewis, 481.
 Lea v. Polk County Copper Co., 347.
 Leacraft v. Dempsey, 227, 228, 276, 303.
 Leak v. Leak, 593.
 League v. Egery, 79.
 Leather Mfg. Nat. Bank v. Cooper, 102.
 Leather Mfrs. Nat. Bank v. Morgan, 344.
 Lee v. Beatty, 777.
 Lee v. Dodge, 164.
 Lee v. Macauley, 720.
 Leech v. Bailey, 372.
 Leeds v. Insurance Co., 388, 389.
 Lees v. United States, 137, 384.
 Leggett v. Postley, 136, 383.
 Le Guen v. Gouverneur, 777, 782, 783.
 Lehigh Co., In re, 838.
 Lennor, In re, 537, 538, 567, 590, 591, 833, 841.
 Lenox v. Notrebe, 388.
 Leo v. Lambert, 597.
 Leroy v. Veeder, 275.
 Levesey v. Wilson, 405.
 Lewis v. Baird, 356.
 Lewis v. Cocks, 12, 245.
 Lewis v. Darling, 73, 187.
 Lewis v. Hawkins, 261.
 Lewis v. King, 720.
 Lewis v. McFarland, 57.
 Lewis v. Shainwald, 715.
 Lewis v. United States, 72.
 Lewisberg Bank v. Sheffey, 728, 743.
 Lichtenaver v. Cheney, 179.
 Lichtenstein v. Dial, 639.
 Lincoln v. Battell, 446.
 Lincoln v. French, 502.
 Lincoln v. Worcester, 555.
 Lingan v. Henderson, 391.
 Lingwood v. Croucher, 345.
 Lippincott v. Mitchell, 79, 91.
 Litchfield v. Ballou, 148, 246.
 Litchfield v. Webster County, 576.
 Liverpool Steam Co. v. Phenix Ins. Co., 498.
 Livingston v. Harris, 136, 383.
 Livingston v. Jefferson, 10, 80, 82, 87, 91, 252.
 Livingston v. Livingston, 143, 581.
 Livingston v. Story, 11, 227, 228, 274, 275, 276, 292, 302, 311, 313, 369.
 Livingston v. Van Ingen, 3.
 Lloyd v. Brewster, 171.
 Lloyd v. Matthews, 493, 499.
 Lockhart v. Horne, 210.
 Logan v. Patrick, 49, 193.
 London Assurance Co. v. East India Co., 364, 415.
 Lonergan v. Buford, 520.
 Longworth v. Taylor, 191.
 Lonsdale v. Littledale, 345, 376.
 Lonsdale Co. v. Moise, 795.
 Lord Abergavenny v. Powell, 799.
 Lord Pelham v. Duchess of Newcastle, 661, 664.
 Lord Portarlington v. Soulby, 553.
 Lord Stowell v. Cole, 706.
 Lorillard v. Standard Oil Co., 715.
 Lotchwell v. Foster, 334.
 Loud v. Sergeant, 291, 373.
 Lougan v. Bowen, 653.
 Louisiana v. Jumel, 245, 576.
 Louisville & Nashville R. Co. v. Palmes, 278.
 Louisville, C. & C. R. Co. v. Letson, 146.
 Louisville Ry. Co. v. Pope, 857.
 Loveridge v. Larned, 873.
 Low v. Burron, 334.
 Lowenstein v. Glidewell, 434, 435, 437, 714.
 Lowry v. Few, 346.
 Lucas v. Hickman, 593.
 Luce v. Graham, 179, 188.
 Ludlow v. Maddock, 254, 547.
 Lund v. Skane's Enskelda Bank, 269, 429.
 Lupton v. Johnson, 135.
 Lynde v. Columbus C. & I. C. Ry. Co., 89, 771.
 Lyon v. Alley, 553.
 Lyon v. Perin & Goff Mfg. Co., 338, 340.
 Lyon v. Tallmadge, 175.
- M.
- Machinery Co. v. Brown Folding Machine Co., 229.
 Mackall v. Casilear, 258.
 Magniac v. Thompson, 148, 246.
 Maguire v. Allen, 610, 612.
 Maitland v. Wilson, 347, 359, 415.

References are to pages.

- Malcomb v. Montgomery, 612.
 Mallock v. Galton, 754.
 Mallow v. Hinde, 39, 44, 726.
 Man v. Ward, 441.
 Mandeville v. Riddle, 337.
 Manhattan Co. v. Evertson, 346.
 Manley v. Mickel, 414.
 Manning v. Lechmere, 441, 442.
 Manning v. Manning, 819.
 Mansell v. Feeney, 334.
 Mansfield, C. & L. M. Ry. Co. v. Swan,
 144, 145, 252, 319, 320, 872.
 Marbury v. Madison, 493.
 Mardis v. Schackeford, 481.
 Marine Ins. Co. v. Hodgson, 552.
 Marine Ins. Co. v. Young, 340.
 Markle v. Markle, 403.
 Marsh v. Whitmore, 258.
 Marshall v. Balt. & Ohio R. Co., 146.
 Marshall v. City of Vicksburg, 276.
 Marshall v. Holmes, 552.
 Marshall v. Thompson, 777.
 Marsteller v. McLean, 25, 183, 357.
 Martin v. Van Schank, 609.
 Maryland v. Baldwin, 71.
 Mason v. Crosby, 795.
 Mason v. Hartford, Providence &
 Fishkill R. Co., 420.
 Mason v. Mason, 777.
 Mason v. McGirr, 430.
 Massachusetts & Southern Const. Co.
 v. Cane Creek Twp., 312, 317.
 Massachusetts Benefit Ass'n v. Miles,
 755.
 Massachusetts Mut. Life Ins. Co. v.
 Chicago & A. R. Co., 330.
 Massie v. Watts, 80, 89, 553, 768, 771.
 Masterson v. Herndon, 857, 858, 859.
 Matthews v. Puffer, 197.
 Maxwell v. Kennedy, 260, 310, 336.
 Maxwell v. Stewart, 199, 200, 469, 473.
 Maxwell Land Grant Case, 506.
 May v. Iron Co., 67.
 Maynard v. Bond, 611.
 Maynard v. Hecht, 838, 845.
 Mays v. Rose, 606, 612.
 Mays v. Wherry, 611.
 Mazarredo v. Maitland, 379.
 McArthur v. Scott, 54.
 M'Broom v. Somerville, 713.
 McCabe v. Cooney, 374.
 McCabe v. Matthews, 164.
 McCaskey v. Barr, 45, 120, 124.
 McCloskey v. Barr, 289, 291, 301, 370,
 373.
 McClosky v. Du Bois, 730.
 McClung v. Ross, 509.
 McClure v. Adams, 68.
 McCullum v. Eager, 831.
 McConihay v. Wright, 12, 148, 246,
 539.
 McConihe v. Knox County, 742.
 McConville v. Gilmour, 5.
 McCormick v. Chamberlin, 131.
 McCormick v. Sullivan, 3, 79, 91.
 McCormick Harvesting Machine Co.
 v. Walthers, 99, 100, 101.
 McCosker v. Brady, 171, 609, 652.
 McCoy v. Rhodes, 387, 391.
 McDonough v. O'Neil, 516.
 McElmoyle v. Cohen, 468, 469.
 McFerran v. Taylor, 786.
 McGarrahan v. Mining Co., 475.
 McGoon v. Scales, 79, 91, 505.
 McGourkey v. Toledo & Ohio Cent.
 Ry. Co., 806.
 McGown v. Yerks, 68, 69.
 McGregor v. Wait, 483.
 McHenry v. Alford, 845.
 McIntosh v. Oglins, 553.
 McKenna v. Fisk, 80, 82, 87, 91, 324.
 McKenzie v. Baldrige, 156.
 McKim v. Thompson, 720.
 McKnight v. Taylor, 336.
 McLaughlin v. Bank of Potomac, 55,
 777.
 McLaughlin v. People's Ry. Co., 336.
 McLaughlin v. Railway Co., 260.
 McLean v. Clapp, 347.
 M'Leod v. City of New Albany, 665,
 669, 670, 794, 801.
 McLish v. Roff, 832, 833, 837, 842.
 McMicken v. Perin, 723, 732, 766, 821.
 McNamara v. Dwyer, 597.
 McNitt v. Turner, 505.
 McNulta v. Lochridge, 640, 642.
 McPhaul v. Lapsley, 532.
 McPherson v. Rathbone, 481.
 McQuade v. Trenton, 835.
 McVeigh v. United States, 217.
 Mead v. Lord Orrery, 631.
 Mead v. Meritt, 553.
 Meagher v. Minnesota Thresher Mfg.
 Co., 742.
 Mechanics' Bank v. Levy, 115, 118,
 119, 126, 132, 149, 151, 159, 233, 306,
 370.
 Medsker v. Bonebrake, 794.
 Meier v. Kansas Pac. Ry. Co., 630.
 Meigs v. McClung, 577.
 Mellen v. Moline Malleable Iron
 Works, 108, 196, 774.
 Memphis v. Brown, 732.
 Memphis City v. Dean, 326.
 Menard v. Goggan, 178.
 Mendenhall v. Hall, 68.
 Menendez v. Holt, 567.
 Mercantile Nat. Bank v. Carpenter,
 260.
 Mercantile Trust Co. v. Missouri, K.
 & T. Ry. Co., 626.
 Merchants' & Manufacturers' Bank
 v. Kent, 611.
 Meritt v. Brown, 391.
 Merrill v. Town of Monticello, 260.
 Merriwether v. Mellish, 698, 701.

References are to pages.

- Metcalf v. Watertown, 13, 144, 145,
 178, 252, 323.
 Metcalf v. Williams, 324.
 Methodist Episcopal Church v.
 Jaques, 120, 124, 132, 379, 381, 815,
 821.
 Metropolitan Nat. Bank v. St. Louis
 Dispatch Co., 334.
 Mexican C. R. Co. v. Pinkney, 192, 201.
 Meyer v. Kuhn, 52, 196.
 Matterson v. Howard, 225.
 Michigan Ins. Bank v. Eldred, 192.
 Mickle v. Stuart, 776.
 Micklethwaite v. Moore, 431.
 Middleton v. Bankers' & Merchants'
 Tel. Co., 792.
 Middleton v. McGrew, 79, 91.
 Miles v. Caldwell, 341.
 Miller v. Clark, 872.
 Miller v. Gregory, 430.
 Miller v. McIntyre, 174, 336.
 Miller v. Miller, 820, 825.
 Miller v. Whittaker, 181.
 Miller-Magee Co. v. Carpenter, 5.
 Milligan v. Milledge, 332.
 Mills v. Dennis, 223, 754.
 Mills v. Duryee, 469, 470.
 Mills v. Gore, 388.
 Mills v. Green, 495.
 Mills v. Hanson, 720.
 Mills v. Hoag, 682, 745.
 Mills v. Knapp, 56.
 Mills v. Pittman, 411, 421, 422.
 Miltenberger v. Logansport Ry. Co.,
 612, 620, 625, 626, 633, 654, 655, 658.
 Milwaukee v. Koeffler, 554.
 Milwaukee, etc. R. Co. v. Soutter, 109,
 110, 194, 434, 774.
 Milwaukee R. Co., Ex parte, 851.
 Miner v. Markham, 196, 197.
 Minor v. Stewart, 391, 392.
 Minor v. Tillotson, 485.
 Minot v. Mastin, 752.
 Minter v. Crommelin, 506.
 Mississippi & Missouri R. Co. v. Ward,
 582.
 Missouri Pac. Ry. Co. v. Texas & P.
 Ry. Co., 650, 651.
 Mitchell v. Bunch, 89, 593, 595, 768,
 771.
 Mitchell v. Dors, 581.
 Mitchell v. Overton, 739.
 Mitchell v. Harmony, 577.
 Mitchell v. United States, 503.
 Moat v. Holbein, 535, 545.
 Mobile & Ohio Ry. Co. v. Davis, 642.
 Mollan v. Torrance, 312, 317, 318.
 Mollock v. Galton, 338.
 Montesquieu v. Sandys, 533.
 Montgomery v. Montgomery, 403.
 Moore v. Hawkins, 149.
 Moore v. Hilton, 727.
 Moore v. Huntington, 436.
 Moore v. Mayhow, 347.
 Moore v. Robbins, 742.
 Moore v. Welsh Copper Co., 330.
 Moran v. Sturges, 328, 650.
 More v. Steinbach, 158.
 Morgan v. Beloit, 338.
 Morgan v. Corliss, 388.
 Morgan v. Curtenius, 79.
 Morgan v. Morgan, 165.
 Morgan v. Nunn, 589.
 Morgan v. Smith, 269, 430.
 Morgan v. Sturges, 551.
 Morgan v. Tipton, 430.
 Morgan's Co. v. Texas Cent. Ry. Co.,
 269, 429, 432, 433, 633, 654, 655.
 Morony v. Vincent, 382.
 Morris v. Gilmer, 319, 320.
 Morris v. Parker, 381.
 Morris v. Taylor, 795.
 Morris & Essex R. Co. v. Prudden,
 108, 583.
 Morse v. Royal, 388.
 Mortlock v. Leathers, 720.
 Mosely v. Armstrong, 388.
 Moses v. Nat. Bank of Lawrence
 County, 337.
 Mosher v. St. Louis, I. M. & S. R. Co.,
 278.
 Mosier v. Norton, 802.
 Mostyn v. Fabrigas, 85.
 Moulton v. Reid, 589.
 Mountfort, Ex parte, 611.
 Mower v. Fletcher, 741.
 Mowry v. Chase, 470.
 Mugler v. Kansas, 591.
 Muir v. Trustees of the Leake and
 Watts Orphan House, 261.
 Mulcahey v. Lake Erie & W. R. Co.,
 453.
 Mulholland v. Hendrick, 533.
 Muller v. Dows, 89, 90, 101, 771.
 Mullins v. Simmonds, 405.
 Mumma v. Potomac Co., 674.
 Munsford v. Murray, 819.
 Munson v. The Mayor, 730.
 Murdock v. Memphis, 834, 836.
 Murdock's Case, 405.
 Murray v. Coster, 262.
 Murrough v. French, 653.
 Mussina v. Cavazos, 851, 857, 858.
 Mutual Life Ins. Co. v. Harris, 328, 468.
 Mutual Life Ins. Co. v. Spratley, 193.

N.

- Nabob of Carnatic v. East India Co.,
 240.
 Napier v. Elam, 391.
 Nashua & Lowell R. Corp. v. Boston
 & Lowell R. Corp., 312, 317, 362.
 Nashville & D. R. R. Co. v. Orr, 61.
 National Acc. Soc. v. Spiro, 201.

References are to pages.

- National Bank v. Carpenter, 180, 282.
 National Bank v. Colby, 674.
 National Bank v. Insurance Co., 354.
 National Bank v. Kimball, 554.
 National Bank v. Smith, 842.
 National Bank of Chemung v. Elmira, 555.
 National Cash-Register Co. v. Leland, 453.
 National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 129, 414.
 National Masonic Acc. Ass'n v. Sparks, 322, 323.
 National Mfg. Co. v. Meyers, 372.
 Nations v. Johnson, 505.
 Neal v. Foster, 433.
 Neale v. Neale, 177, 178, 408, 678.
 Nedby v. Nedby, 235.
 Nelson v. Cook, 198.
 Nelson v. Eaton, 181.
 Nelson v. Foster, 328.
 Nelson v. Hill, 171, 257.
 Nelson v. Robinson, 549.
 Nelson v. United States, 446, 462, 463.
 Nepeau v. Doe dem. Knight, 507.
 Nesbit v. Independent District of Riverside, 341, 468.
 Neve v. Weston, 331.
 Neves v. Scott, 11, 20, 539.
 Newberry v. Blatchford, 269, 430.
 Newby v. Oregon Cent. Ry. Co., 31, 291, 293, 354, 356.
 Newland v. Rogers, 169, 257.
 Newman v. Moody, 732.
 Newman v. Supervisors, 555.
 Newman v. Wallis, 334.
 New England Ins. Co. v. Detroit & C. Steam Nav. Co., 200.
 New Hampshire v. Louisiana, 574, 575, 576.
 New Orleans v. Benjamine, 841.
 New Orleans v. Citizens' Bank, 340.
 New Orleans v. Gaines, 739.
 New Orleans v. Louisiana Construction Co., 10.
 New York v. Connecticut, 240.
 New York v. Louisiana, 574, 575, 576.
 New York & Maryland Line R. Co. v. Winans, 500.
 New York Fourth Nat. Bank v. Franklyn, 493.
 New York Guaranty & Ind. Co. v. Memphis Water Co., 12, 148, 246.
 New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co., 655.
 New York Printing & Dyeing Establishment v. Fitch, 581.
 New York Security & Trust Co. v. Lincoln St. Ry. Co., 679.
 Nice v. Purcell, 777.
 Nickerson v. Nickerson, 164.
 Nightengale v. Oregon Central R. Co., 142.
 Nix v. Hedden, 501.
 Noonan v. Bradley, 56, 245, 253.
 Noonan v. Lee, 11, 539.
 Norman v. Huddleston, 430.
 Norris v. Hoggan, 258.
 North Chicago Rolling Mill Co. v. St. Louis Ore & S. Co., 552.
 Northern Indiana R. Co. v. Michigan Central R. Co., 76, 79, 80, 82, 89, 91.
 Northern Pac. R. Co. v. Amato, 102.
 Northern Pac. R. Co. v. Clark, 554.
 Northern Pac. R. Co. v. Paine, 10.
 Northern Pac. R. Co. v. Walker, 169, 257.
 Northwestern Fuel Co. v. Brock, 870.
 Northwestern Union Packet Co. v. Clough, 324.
 Norton v. Brownsville, 857.
 Norton, Ex parte, 741, 743.
 Noyes v. Willard, 289, 291, 293, 373.
 Nurse v. Bunn, 391.
 Nussbaum v. Stein, 612.
 Nyburg v. Pearce, 431.
- O.
- O'Conner v. Cook, 777.
 Oelrichs v. Spain, 549.
 Oelrichs v. Williams, 148, 246.
 Offley v. Morgan, 272.
 Ogden v. Larrabee, 819.
 O'Hara v. McConnell, 54, 192, 206, 211, 212, 223, 225, 226, 401, 403, 754.
 Ohio v. Frank, 755.
 Ohio & Miss. R. Co. v. Wheeler, 312, 317.
 Ohio Cent. R. Co. v. Cent. Trust Co., 209, 210, 211, 225, 226.
 Oil Co. v. Van Etten, 344.
 Olcott v. Bynum, 79, 91.
 Oliver v. Piatt, 171, 261.
 O'Neil v. Hamill, 799.
 Onderdonk v. Gray, 430.
 Orcutt v. Orms, 356, 359, 415.
 Oregon & Transcontinental Co. v. Northern Pac. R. Co., 677.
 Oregon S. L. & U. N. R. Co. v. Skottow, 147.
 Orleans, The, v. Phœbus, 10, 252.
 Ormund v. Hutchinson, 391.
 O'Reilly v. Edrington, 855.
 Orr v. Morris, 433.
 Osborn v. Bank of the United States, 47, 102, 553, 576, 840.
 Osborn v. Hyer, 610.
 Osterman v. Baldwin, 337.
 Owden v. Campbell, 254.
 Owings v. Hull, 493.
 Owings v. Kincannon, 857.
 Ozark Land Co. v. Leonard, 224, 372.

References are to pages.

P.

- Pacific Postal Cable Co. v. Fleischer, 756.
 Pacific R. Co. v. Cutting, 269.
 Pacific Railroad of Missouri v. Missouri Pacific R. Co., 109, 484.
 Pacific Railroad Removal Cases, 102.
 Page v. Maffet, 589.
 Paine v. Central Vt. R. Co., 337.
 Panama R. Co. v. Napier Shipping Co., 848.
 Paquette, The, 832, 833.
 Parcels v. Johnson, 741.
 Parker v. Bird, 12.
 Parker v. Dacres, 12, 79, 91.
 Parker v. Fairlie, 232.
 Parker v. Hotchkiss, 197.
 Parker v. Judges, 541.
 Parker v. Ormsby, 147.
 Parker v. Winnipiseogee Lake Cotton & Woolen Co., 148, 246, 582.
 Parkhurst v. Kinsman, 676, 677.
 Parks v. Booth, 393.
 Parry v. Ashley, 721.
 Parsons v. Robinson, 842.
 Parteriche v. Pawlet, 387.
 Partridge v. Haycroft, 179.
 Patch v. White, 521, 531.
 Patterson v. Ackerson, 785.
 Patterson v. Gaines, 129, 389.
 Patterson v. Slaughter, 405.
 Pattison v. Hull, 430.
 Patton v. Taylor, 149.
 Payne v. Collier, 720.
 Payne v. Hook, 54, 55, 148, 246.
 Payne v. Niles, 849.
 Payne v. Treadwell, 156.
 Peachin v. Twycross, 272.
 Pearce v. Hooper, 483.
 Pearce v. Rice, 356, 357, 358, 360, 361, 420.
 Pearne v. Lisle, 593.
 Pearse v. Green, 382.
 Peck v. Jenness, 328, 551.
 Peddock v. Brown, 798.
 Peer v. Cookerow, 698, 705.
 Peik v. Chicago & Northwestern Ry. Co., 580.
 Pelton v. National Bank, 557.
 Pelton v. Platner, 470.
 Pember v. Mathers, 385.
 Pemberton v. Pemberton, 786, 787.
 Pemberton v. Topham, 707.
 Pendleton v. Evans, 206, 213.
 Penn v. Lord Baltimore, 89, 240, 311, 553, 768, 771.
 Penn Mut. Life Ins. Co. v. City of Austin, 258, 259, 260.
 Pennie v. Reis, 278.
 Pennington v. Gibson, 493.
 Pennington v. Lord Muncaster, 821.
 Pennoyer v. McConaughy, 575, 576.
 Pennoyer v. Neff, 53, 76, 192, 470, 553.
 Pennsylvania Co. v. Railway Co., 873.
 Pennsylvania R. Co. v. St. Louis R. Co., 312, 317.
 People v. New York, 156.
 People v. Norton, 613.
 People v. Weaver, 557.
 Peper v. Fordyce, 1.
 Pepper v. Dunlap, 742.
 Perkins v. Fourniquet, 727, 740, 755, 756.
 Perkins v. Hendrix, 36.
 Perkins v. Nichols, 389.
 Peters v. Bain, 12, 79, 91.
 Petri v. Commercial National Bank of Chicago, 103.
 Petty v. Hannum, 391.
 Pewabic Min. Co. v. Mason, 772, 773.
 Phelps v. Garrow, 356.
 Phelps v. McDonald, 89, 553, 771.
 Phelps v. Sproule, 345.
 Phenix v. Ingram, 388.
 Philadelphia & Trenton R. Co. v. Stimpson, 506, 533.
 Philadelphia & Wilmington R. Co. v. Howard, 162.
 Phillips v. Buck, 221.
 Phillips v. Hallister, 391.
 Phillips and Colby Construction Co. v. Seymour, 164.
 Phoenix Ins. Co. v. Wulf, 198.
 Phosphate Co. v. Brown, 174.
 Piatt v. Oliver, 70.
 Piatt v. Vattier, 25, 183, 260, 261, 336, 357.
 Pierce v. Brown, 379, 386, 411, 421, 422.
 Pierce v. Indseth, 498.
 Pickett v. Ferguson, 553.
 Picquet v. Swan, 653.
 Pilkington v. Wignell, 678.
 Pitt v. Hill, 338.
 Pleasants v. Southern Ry. Co., 792.
 Poindexter v. Greenhow, 575, 576, 578.
 Polk v. Gallant, 347.
 Polk v. Wendal, 506.
 Pollak v. Brush Electric Ass'n, 162.
 Pollard v. Dwight, 199, 315.
 Poor v. Carlton, 548.
 Poor v. Clark, 40.
 Pope Mfg. Co. v. Gormully, 164.
 Porter v. Sabin, 603, 605, 641, 646.
 Porter v. Spencer, 593.
 Porter Land & Water Co. v. Baskin, 197.
 Post v. Supervisors, 473, 501.
 Postal Tel. Cable Co. v. Adams, 222.
 Postal Tel. Cable Co. v. United States, 147.
 Potter, Ex'r, v. Third National Bank of Chicago, 448.
 Potts, In re, 731, 768.

References are to pages.

- Poultney v. City of Lafayette, 20.
 Powell v. Cleaver, 515.
 Power v. Reader, 798.
 Powers v. Cheasapeake & O. R. Co., 842.
 Powys v. Mansfield, 533.
 Pratt v. Law, 783.
 Prentice v. Pickersgill, 756.
 Prentice v. Storage Co., 169, 257.
 Prentiss v. Brennan, 146.
 President of Bowdoin College v. Merritt, 550.
 Preston v. Finley, 354.
 Preston v. Preston, 164.
 Prevost v. Gratz, 261, 336.
 Price v. Price, 347, 376.
 Prince v. Blackburn, 481.
 Prince v. Heylin, 334.
 Prout v. Roby, 780.
 Providence Rubber Co. v. Goodyear, 766, 767.
 Pulliam v. Pulliam, 54, 827.
 Pullian v. Pullian, 798.
 Pullman v. Stebbins, 169, 257.
 Pullman's Palace Car Co. v. Central Transp. Co., 709, 710.
 Punderson v. Dixon, 798.
 Purcell v. Coleman, 164, 357.
 Purcell v. McNamara, 798, 799.
 Purcell v. Miner, 766, 767.
 Pusey v. Wright, 391.
 Putnam v. Day, 766.
 Putnam v. Jacksonville, L. & St. L. Ry. Co., 625.
- Q.**
- Quackenbush v. Leonard, 745.
 Quigley v. Roberts, 223, 754.
 Quinby v. Conlan, 781.
 Quincy R. Co. v. Humphreys, 640.
- R.**
- Radford v. Wilson, 347, 376.
 Ragland v. Broadnax, 437.
 Railroad Co. v. Durant, 261.
 Railroad Co. v. Ferry Co., 493.
 Railroad Co. v. Harris, 101.
 Railroad Co. v. McComb, 275.
 Railroad Co. v. Souter, 652.
 Railroad Co. v. Swasey, 741.
 Railroad Co., Ex parte, 269, 426, 427, 429, 436.
 Railroad & Coal Co. v. Blatchford, 312, 317.
 Railroad Commission Cases, 580.
 Railway Co. v. Cowdrey, 665.
 Railway Co. v. Foley, 756.
 Railway Co. v. Swan, 13.
 Randall v. Howard, 264.
 Randall v. Phillips, 387.
 Ranger v. Cotton-Press Co., 174.
 Rankin v. Huskisson, 537.
 Rape v. Heaton, 470.
 Rateau v. Bernard, 146, 317.
 Rawlings v. Rawlings, 338.
 Ray v. Lord, 741.
 Ray v. Low, 743.
 Rea v. Missouri, 514.
 Read v. Consequa, 194.
 Reagan v. Farmers' Loan & Trust Co., 575, 576, 578, 580.
 Reagan v. Mercantile Trust Co., 580.
 Recker v. Powell, 766, 767.
 Reed v. Cumberland Ins. Co., 129, 389, 414.
 Reed v. Cutter, 394.
 Reed v. Proprietors of Locks & Canals, 521.
 Reed v. Stanley, 270, 350.
 Reeside, The, 519.
 Reeves v. Keystone Bridge Co., 731.
 Reining v. City of Buffalo, 160.
 Relsey v. Crowther, 165.
 Remer v. McKay, 269, 429.
 Remsen v. Remsen, 666, 798, 802, 807, 815.
 Renaud v. Abbott, 495.
 Renner v. Bank of Columbia, 485.
 Requa v. Rea, 774.
 Reynolds v. Crawfordsville Bank, 389, 410.
 Reynolds v. Stockton, 470.
 Rhino v. Emery, 297, 333.
 Rhoades v. Selin, 454.
 Rhode Island v. Massachusetts, 76, 199, 241, 260, 290, 291, 304, 305, 355, 356, 360, 373, 374, 375, 420, 715.
 Rhodes v. Cousins, 593.
 Rhodes v. Selin, 483.
 Ribon v. Railroad Cos., 44, 47, 48, 255, 726.
 Ricard v. Williams, 509, 512.
 Rice v. Ames, 833.
 Rice v. Houston, 106.
 Rice v. Sanger, 742.
 Richards v. Mackall, 150, 258, 260.
 Richardson v. Bank of England, 721.
 Richardson v. Golden, 454.
 Richardson v. Green, 854.
 Richardson v. Greese, 344.
 Richardson v. Richardson, 181, 408.
 Richmond v. Atwood, 740.
 Richmond v. Irons, 646.
 Richmond & Danville Ry. Co. v. Jones, 481.
 Richmond & Danville Ry. Co. v. Thouron, 842.
 Richter v. Jerome, 59.
 Ricker v. Powell, 270, 350.
 Riddle v. Whitehall, 261, 334.
 Ridley v. Obee, 405.
 Ridgeway v. Darwin, 387, 815.

References are to pages.

- Ridings v. Johnson, 10, 12, 79, 91.
 Riggs v. Tayloe, 485, 533.
 Ringgold v. Jones, 777.
 Ritchie v. McMullen, 471.
 Roach v. Damron, 80, 81, 91.
 Roach v. Summers, 387, 422.
 Roat v. Lake Shore & Michigan Southern R. Co., 148.
 Roat v. Railway Co., 12.
 Robbins v. Davis, 116, 119.
 Roberts v. Evans, 254.
 Roberts v. Northern Pacific R. Co., 341, 468.
 Roberts v. Roberts, 388.
 Robertson v. Allen, 481.
 Robertson v. Cease, 145.
 Robertson v. Pickrell, 58, 79, 91, 484.
 Robinsen v. Cunningham, 815.
 Robinson v. Caldwell, 838.
 Robinson v. Campbell, 11, 20, 246, 539.
 Robinson v. Davis, 370.
 Robinson v. Hook, 261, 264.
 Robinson v. Lord Byron, 537.
 Robinson v. Randolph, 423.
 Robinson v. Satterlee, 28, 713, 719.
 Robinson v. Scotney, 387, 391, 815.
 Robinson v. Smith, 274.
 Robinson, Ex parte, 591.
 Roche v. Morgell, 342, 344, 356, 376.
 Roemer v. Simon, 394, 395, 728, 732.
 Rogers v. Marshall, 730.
 Rogers v. McMachan, 431.
 Rogers v. Nashville, Chattanooga & St. Louis Ry. Co., 174.
 Rogers v. Soutton, 720.
 Root v. Lake Shore & Mich. S. R. Co., 246.
 Root v. Woolworth, 109, 434, 676, 687, 706.
 Rose v. Woodruff, 211, 212.
 Rosenthal v. Walker, 503.
 Ross v. City of Ft. Wayne, 676, 680, 682, 683.
 Ross v. M'Lung, 79.
 Rothwell v. Rothwell, 720.
 Rouse v. Hornsby, 665, 670, 843.
 Rouse v. Letcher, 646, 665, 669, 752, 794, 801, 843.
 Ruckman v. Decker, 739.
 Rude v. Whitchurch, 391.
 Rumney v. Mead, 334.
 Russel v. Ashby, 593.
 Russell v. Clark's Ex'rs, 54.
 Russell v. Farley, 546, 549.
 Russell v. Place, 342, 472.
 Russell v. Southard, 11.
 Russell's Heirs v. Craig's Devises, 698.
 Rutherford v. Dawson, 720.
 Rutland v. Brett, 338.
 Rutland Marble Co. v. Ripley, 164, 165.
 Rutland R. Co. v. Central Vt. R. Co., 835.
 Ryder v. Bateman, 135.
 Ryder v. Holt, 567.
 Ryland v. Green, 698.
- S.
- Sabine, In re, 109, 434.
 Sage v. Memphis & Little Rock R. Co., 623, 625.
 Sage v. Railroad Co., 852.
 Salmand v. Symond, 156.
 Salmon v. Smith, 391, 392.
 Salter v. Tobias, 301.
 Saltus v. Tobias, 291, 293, 373.
 Salvador v. Rapley, 807, 811, 812.
 Sanders v. King, 334.
 Sandford v. Paul, 799.
 Sanger v. Nightingale, 335.
 San Pedro, The, 852.
 San Pedro, etc. Co. v. United States, 732.
 Saunders v. Gray, 774.
 Saunders v. Hord, 334.
 Sauzer v. De Meyer, 376.
 Savillard v. Dias, 704.
 Savin, Re, 458.
 Sawyer v. Campbell, 408.
 Sawyer, In re, 539, 589.
 Scammon v. Hobson, 386.
 Scanlan v. Scanlan, 372.
 Schell v. Cochran, 756.
 Schell v. Dodge, 869.
 Schieffelin v. Stewart, 819.
 Schoonmaker v. Gillett, 592.
 Schutz v. Jordan, 502, 503.
 Schollenberger, Ex parte, 101, 111, 315.
 Scotia, The, 499.
 Scott v. Armstrong, 10.
 Scott v. Coleman, 470.
 Scott v. Donald, 542.
 Scott v. Lalor, 430.
 Scott v. Neely, 10, 148, 246.
 Scott v. Sandford, 10, 13, 14, 145, 252, 311, 313, 323.
 Schwartz v. Wendell, 391.
 Sea Ins. Co. v. Stebbins, 611.
 Sealy v. Laird, 593.
 Seaman v. Northwestern Mut. Life Ins. Co., 791, 792.
 Searles v. Jacksonville, P. & M. R. Co., 541, 611.
 Seabee v. Dorr, 485, 533.
 Segee v. Thomas, 72, 194.
 Seitz v. Brewers' Refrigerating Co., 520.
 Seitz v. Mitchell, 387, 422.
 Sellon v. Lewen, 359, 415.
 Seneca Nation of Indians v. Christy, 835.
 Seney v. Wabash Western Ry. Co., 640.

References are to pages.

- Senhouse v. Earl, 338.
 Sercomb v. Catlin, 553.
 Sere v. Pitot, 318.
 Sergeant's Lessee v. Biddle, 452.
 Seton v. Slade, 366.
 Settle v. Alison, 481.
 Settlemier v. Sullivan, 469.
 Sewell v. Bridge, 344.
 Sewell v. Freeston, 338.
 Seymour v. Freer, 851.
 Seymour v. Hazard, 30, 593.
 Shackelford's Adm'r v. Shackelford, 651.
 Sharon v. Terry, 550.
 Sharp v. Carlisle, 372, 374.
 Sharp v. Fields, 156.
 Shaw v. Bill, 191, 676, 690.
 Shaw v. Little Rock & Ft. S. R. Co., 59.
 Shaw v. Quincy Min. Co., 101, 146, 252.
 Sheffield Furnace Co. v. Witherow, 246, 247, 280, 354.
 Sheffield & Birmingham Coal, Iron & Railway Co. v. Gordon, 822, 823.
 Sheirburn v. Cordova, 246.
 Shelby v. Bacon, 328.
 Shelden v. Hopkins, 470.
 Sheldon v. Sill, 4.
 Shellabarger v. Oliver, 453.
 Shelly v. Guy, 79.
 Shelton v. Platt, 553.
 Shelton v. Van Kleeck, 766.
 Shepherd v. Roberts, 379.
 Sheppard v. Graves, 311, 313, 317, 322, 323.
 Shields v. Barrow, 39, 44, 45, 47, 48, 114, 118, 148, 172, 175, 183, 199, 246, 255, 269, 270, 332, 357, 426, 427, 429, 432.
 Shields v. Coleman, 649, 838, 839.
 Shields v. Thomas, 171.
 Shillaber v. Robinson, 746, 749.
 Shirk v. City of La Fayette, 106.
 Shoe Co. v. Sykes, 639.
 Shreveport v. Cole, 319, 320, 506.
 Shudal v. Jekyll, 515.
 Sibbald v. United States, 868, 869.
 Sickels v. Borden, 545.
 Sidney v. Perry, 338, 364, 415.
 Sidney v. Sidney, 533.
 Siffkin v. Manning, 362, 364, 415.
 Sigel v. Phelps, 254.
 Silsby v. Foot, 785.
 Simmons v. Saul, 470, 485.
 Simms v. Guthrie, 736.
 Simon Creek Coal Co. v. Doran, 347.
 Simpson, Ex parte, 167.
 Sims v. Hundly, 311, 312, 313, 317.
 Single v. Scott Paper Mfg. Co., 108.
 Singleton v. Gayle, 388.
 Sioux City, O. & W. Ry. Co. v. Manhattan Trust Co., 752.
 Skillern's Ex'rs v. May's Ex'rs, 869.
 Skinner v. Maxwell, 606.
 Skip v. Harwood, 611.
 Slack v. Black, 264.
 Slack v. Walcott, 676, 693, 696, 698, 701.
 Slater v. Cobb, 269.
 Slater v. Maxwell, 381.
 Slawson v. Grand Street R. Co., 395, 396.
 Small v. Northern Pacific R. Co., 857.
 Smell v. De Land, 822.
 Smith v. Althus, 796, 799.
 Smith v. Babcock, 405, 406.
 Smith v. Burnham, 715.
 Smith v. Clark, 533.
 Smith v. Clay, 336.
 Smith v. Cunningham, 391.
 Smith v. Gale, 483.
 Smith v. Graham, 799.
 Smith v. Greenhow, 317.
 Smith v. Jackson, 4.
 Smith v. Kernochen, 311, 312, 313, 317, 338.
 Smith v. Lyon, 100, 146, 252.
 Smith v. Martin, 777.
 Smith v. McCann, 79.
 Smith v. McCullough, 633, 658.
 Smith v. McKay, 839.
 Smith v. Naugle, 777.
 Smith v. Overton, 346.
 Smith v. Sargent Mfg. Co., 104, 105.
 Smith v. Swomstedt, 70.
 Smith v. Vulcan Iron Works, 868.
 Smith, Ex parte, 144, 252, 323.
 Smyth v. New Orleans Canal & Banking Co., 148, 245, 246.
 Sneed v. Ewing, 58, 79, 91, 484.
 Snook v. Snetzer, 553.
 Snyder v. Fielder, 448.
 Snyder v. Snyder, 470.
 Society v. Pawlet, 324.
 Soulard v. United States, 243.
 South Ottawa v. Perkins, 501.
 Southard v. Russell, 731, 766, 768.
 Southern Development Co. v. Silva, 385.
 Southern Pacific Co. v. Denton, 100, 101, 146, 200, 201, 252, 310, 315.
 Southern Pac. R. Co. v. Temple, 212.
 Southern Pac. R. Co. v. United States, 340.
 Southern Ry. Co. v. Carnegie Steel Co., 629, 653, 654, 655, 657, 665, 669, 752, 794, 801.
 Souzer v. De Meyer, 307.
 Sparhawk v. Yerkes, 640.
 Spears v. Cheatham, 209, 210.
 Specht v. Howard, 519.
 Speidel v. Henrici, 258, 261.
 Spencer v. Birmingham Ry. Co., 537.
 Spencer v. Van Duzen, 182, 183, 184, 357.
 Spofford v. Manning, 367.
 Spofford, In re, 456, 459, 467.

References are to pages.

- Spokane Falls & N. R. Co. v. Ziegler, 493.
 Spraggs v. Binks, 326.
 Sprigg v. Bank of Mount Pleasant, 518.
 Spring v. Insurance Co., 481.
 Stafford v. Brown, 115, 118, 306, 370, 413.
 Stafford v. Howlett, 185, 678.
 Stampers v. Griffin, 480.
 Stanley v. Robinson, 372.
 Stanley v. Supervisors, 555, 558.
 Stanton v. Embry, 328.
 Stanton v. Alabama & C. R. Co., 620, 658, 823.
 Stapylton v. Scott, 430.
 Stark v. Starr, 148.
 State v. Columbia, 391.
 State v. Dunwell, 499.
 State v. Hemingway, 710.
 State v. Melton, 198.
 State v. Wagner, 499, 501.
 State v. Wilmer, 608.
 State of New York v. State of Connecticut, 544.
 State of Pennsylvania v. The Wheeling Bridge Co., 540, 583.
 State of South Carolina v. Port Royal & A. Ry. Co., 634.
 State Railroad Taxes Case, 554.
 States v. Chaves, 512.
 Stearns v. Page, 148, 295, 306, 336, 376.
 Stebbins v. Duncan, 480, 481, 485.
 Stebbins v. Town of St. Anne, 43.
 Steiger v. Bonn, 197.
 Stephens v. McCargo, 171, 172.
 Stermes v. Franklin Co., 732.
 Stevens v. Cooper, 441.
 Stevens v. Nichols, 13.
 Stevens v. Post, 387.
 Stevens v. Praed, 786, 787.
 Stevens v. The Railroads, 709.
 Stewart v. Dunham, 646.
 Stewart v. Gay, 819.
 Stewart v. Graham, 597.
 Stewart v. Masterson, 275, 279.
 Stewart v. Solomon, 731, 768, 869.
 Stewart v. Smith, 213.
 Stewart, In re, 456, 459, 467.
 Stickney v. Stickney, 513.
 Stickney v. Wilt, 868.
 Stillwell v. Williams, 606.
 Stirrat v. Excelsior Mfg. Co., 229.
 St. Clair v. Cox, 192.
 St. Clair County v. Livingston, 741.
 St. Joseph & Grand Island R. Co. v. Steel, 102.
 St. Joseph & St. Louis R. Co. v. Humphreys, 640.
 St. Louis v. Knapp, 148, 155, 158, 372.
 St. Louis v. Rutz, 12.
 St. Louis, Alton, etc. Ry. Co. v. Cleveland, Columbus, etc. Ry. Co., 655.
 St. Louis & San Francisco Ry. Co. v. James, 102.
 St. Louis & S. F. R. Co. v. McBride, 111, 199, 200, 315.
 St. Louis, etc. Ry. Co. v. Johnson, 149.
 St. Louis, Iron Mt. etc. R. Co. v. Southern Express Co., 741, 743.
 St. Louis Public Schools v. Risley's Heirs, 509.
 St. Louis Ry. Co. v. Cleveland Ry. Co., 633.
 St. Romes v. Levee Cotton Press Co., 339.
 Stoddard v. Chambers, 482.
 Stokes v. McKerrall, 777.
 Stone v. Moore, 372.
 Stonemetz P. M. Co. v. Brown F. M. Co., 269, 429.
 Stonington Savings Bank v. Davis, 795.
 Storey v. Brown, 809.
 Storms v. Storms, 25, 182, 183, 357.
 Story v. Livingston, 11, 17, 19, 20, 53, 72, 539, 694, 715, 794, 818, 821, 822.
 Story v. Lord Windsor, 347.
 Story, Ex parte, 731, 768, 869.
 Stoughton v. Lynch, 818.
 Strang v. Harris, 720.
 Strange v. Collins, 405.
 Strettel v. Ballow, 10, 252.
 Strode v. Blackburne, 346.
 Strother v. Lucas, 498.
 Strull, Petitioners. In re, 752.
 Stuart v. Boulware, 638, 639, 753.
 Stubbs v. Leigh, 681.
 Sugar v. Steel, 822.
 Sullivan v. Judah, 535, 545.
 Sullivan v. Portland & K. R. Co., 13, 148, 150, 246, 258, 260.
 Sullivan v. Steamboat Co., 252.
 Sumner v. Thorpe, 344, 345.
 Sunflower Oil Co. v. Wilson, 640, 752.
 Supervisors v. Stanley, 558.
 Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., 68.
 Sutton v. Bancroft, 756.
 Suydam v. Beals, 208, 397.
 Swallow v. Day, 405.
 Swan v. Clark, 658.
 Swatzel v. Arnold, 186, 676.
 Symmes v. Strong, 389.

T.

- Talbot v. Rutledge, 391.
 Talbot v. Seeman, 498.
 Talmage v. Pell, 405.
 Tampa Suburban R. Co., In re, 868.
 Tanfield v. Irvine, 612.
 Tanner v. Radford, 774.
 Tappan v. Gray, 589.
 Tappan v. Smith, 676, 683.
 Tayloe v. Riggs, 532.

References are to pages.

- Taylor v. Allen, 608.
 Taylor v. Barron, 470.
 Taylor v. Brenham, 25, 183, 357.
 Taylor v. Bruen, 136, 383.
 Taylor v. Carryl, 551.
 Taylor v. Holmes, 71, 74, 255.
 Taylor v. Kercheval, 589.
 Taylor v. Life Ass'n, 144, 145, 252.
 Taylor v. Longworth, 191, 199.
 Taylor v. Luther, 380.
 Taylor v. Obee, 405.
 Taylor v. Reed, 826.
 Taylor v. Sharp, 338.
 Taylor v. Taintor, 551.
 Teal v. Walker, 623.
 Tedswell v. Bowyer, 405.
 Telegraph Co. v. Texas, 578.
 Telfair et al., Ex'rs, v. Stead's Ex'rs, 55.
 Temple v. Baltinglass, 338.
 Templeman v. Fauntleroy, 798.
 Tench v. Cheese, 418.
 Tennessee v. Union & P. Bank, 13, 144, 145, 147, 252, 323.
 Terhune v. Phillips, 492.
 Terre Haute & I. R. Co. v. Peoria & P. U. R. Co., 550.
 Terrell v. Allison, 647, 770, 771, 773, 774.
 Terry, Ex parte, 591.
 Texas & Pacific Ry. Co. v. Cody, 147, 493.
 Texas & Pacific Ry. Co. v. Anderson, 869.
 Texas & Pacific Ry. Co. v. Bloom, 642, 643.
 Texas & Pacific Ry. Co. v. Cox, 641, 642.
 Texas & Pacific Ry. Co. v. Gay, 653.
 Texas & Pacific Ry. Co. v. Johnson, 642, 643.
 Texas & Pacific Ry. Co. v. Murphy, 732.
 Texas & Pacific Ry. Co. v. Saunders, 315.
 Texas & Pacific Ry. Co. v. Welder, 453.
 Texas & St. L. Ry. Co. v. Rust, 651.
 Thatcher v. Powell, 79.
 Thayer v. Wales, 198.
 Thomas v. Brockenbrough, 270, 350, 766, 767.
 Thomas v. Harvey's Heirs, 766.
 Thomas v. Oakley, 581.
 Thomas v. Robinson, 470.
 Thomas v. Western Car Co., 633, 665, 669, 794, 801.
 Thompson v. Central Ohio R. Co., 148, 245, 246.
 Thompson v. Dean, 741.
 Thompson v. Lambe, 387, 391, 815.
 Thompson v. Maxwell, 178, 766, 767.
 Thompson v. McReynolds, 109, 194, 434.
 Thompson v. Railroad Co., 246, 539.
 Thompson v. Roberts, 338, 468.
 Thompson v. Scott, 641, 643, 665.
 Thompson v. Smith, 770, 771, 773, 774, 791.
 Thompson v. Tolmie, 505.
 Thompson v. Whitman, 469.
 Thomson v. Wooster, 18, 199, 203, 204, 207, 209, 210, 211, 212, 225, 226, 397, 801.
 Thorn v. Germand, 181.
 Thorp v. Yeates, 254.
 Three Friends, The, 500, 848.
 Thring v. Edgar, 334.
 Thurber v. Cecil Nat. Bank, 467.
 Tibbals v. Sargent, 612.
 Tilghman v. Proctor, 793, 795.
 Tindal v. Cobham, 720.
 Tinnin v. Price, 481.
 Tilton v. Cofield, 774.
 Tittenson v. Peat, 345.
 Tobey v. Leonard, 385.
 Todd v. Daniel, 858, 860.
 Toland v. Sprague, 111, 199, 200, 315, 653.
 Toller v. Carteret, 768.
 Tomlinson v. Branch, 576.
 Tomlinson v. Ward, 611, 612, 630.
 Tompkins v. Elliott, 163.
 Tompkins v. Ward, 346.
 Toplitz v. Hedden, 501.
 Toulmin v. Reid, 431.
 Tourville v. Naish, 346.
 Town v. Needham, 387.
 Town of South Ottawa v. Perkins, 473.
 Town Savings Bank of New Haven v. Epping, 187.
 Townsend v. Graves, 777.
 Townsend v. Little, 346.
 Townsend Savings Bank v. Epping, 256.
 Townsley v. Sumrall, 498.
 Tracy v. Holcombe, 742.
 Trade-mark Cases, 567.
 Traedor v. Hyams, 481.
 Travers v. Ross, 283.
 Tremaine v. Hitchcock, 178, 678.
 Trevanian v. Morse, 346.
 Troy Iron & Nail Factory v. Corning, 824.
 Truly v. Wanzer, 552.
 Trust & Fire Ins. Co. v. Jenkins, 174, 181.
 Trust Co. v. Grant Locomotive Works, 752.
 Trust Co. v. Railroad Co., 64.
 Trustees v. Greenough, 639, 872.
 Tucker v. Moreland, 514.
 Turgean v. Brady, 612.

References are to pages.

- Turner v. Bank of North America, 3, 145, 252.
 Turner v. Ogden, 163.
 Tworl v. Tworl, 581.
 Tyler v. Hand, 272.
 Tyler v. Savage, 12, 148, 245, 246.
 Tyler v. Simmons, 820, 822, 824, 825.
 Tyler, In re, 553, 554, 644, 646.
- U.
- Uhlmann v. Arnholt & Schaeffer Brewing Co., 129, 131, 414.
 Union Bank v. Barker, 136, 383.
 Union Bank v. Geary, 130, 385.
 Union Bank of Louisiana v. Stafford, 256.
 Union Mutual Life Ins. Co. v. Kirchoff, 742.
 Union Pacific Ry. Co. v. Harris, 102, 849.
 Union Pacific Ry. Co. v. Ryan, 554.
 Union Savings Bank v. Taber, 509.
 Union Sugar Refinery v. Mathieson, 817, 821.
 Union Sugar Refinery v. Matthewson, 197.
 Union Trust Co. v. Illinois Midland Ry. Co., 620, 622, 625, 626, 628, 629, 630, 631, 633, 646, 654, 655, 658, 720.
 Union Trust Co. v. Morris, 633, 655.
 Union Trust Co. v. Souther, 620, 625, 633, 654, 655.
 Union Trust Co. v. Southern Navigation Co., 774.
 United Railroad & Canal Co. v. Long Dock Co., 408.
 United States v. Amedy, 473.
 United States v. American Bell Telephone Co., 149, 289, 291, 373.
 United States v. Armejo, 201.
 United States v. Arredondo, 76, 243.
 United States v. Atherton, 149, 270.
 United States v. Beard, 160.
 United States v. Bell Telephone Co., 849.
 United States v. Bridgeman, 197.
 United States v. Cameron, 452.
 United States v. California & Oregon Land Co., 289, 291, 356, 357, 373, 375.
 United States v. Carr, 505.
 United States v. Castro, 486.
 United States v. Chaves, 496, 497, 509.
 United States v. Crosby, 79, 91.
 United States v. Curry, 201, 852, 855.
 United States v. Dalles Military Road Co., 305, 356, 357.
 United States v. Dashiell, 849.
 United States v. Dickson, 509.
 United States v. Drennen, 10, 252.
 United States v. Drew, 8.
 United States v. E. C. Knight Co., 559, 563.
 United States v. Freight Ass'n, 558.
 United States v. Gillespie, 332.
 United States v. Harris, 636.
 United States v. Hopewell, 850.
 United States v. Howland, 11, 20, 539.
 United States v. Hudson, 591.
 United States v. Huffmaster, 316.
 United States v. Iron Silver Mining Co., 506.
 United States v. Jellico Mountain Coal & Coke Co., 9.
 United States v. Jahn, 473, 830, 840, 841.
 United States v. Jones, 8.
 United States v. Knight, 731, 763.
 United States v. L. & P. Can Co., 541.
 United States v. Le Baron, 503.
 United States v. Lee, 577.
 United States v. Lynde, 499.
 United States v. Mexican Nat. Ry. Co., 9.
 United States v. Mooney, 105.
 United States v. Moore, 336.
 United States v. Palmer, 499.
 United States v. Peggy, 244.
 United States v. Peralta, 506.
 United States v. Percheman, 243.
 United States v. Perot, 496, 497.
 United States v. Rauscher, 493.
 United States v. Reynes, 499.
 United States v. Rider, 832, 833, 837.
 United States v. Ross, 505.
 United States v. Saline Bank, 136, 383.
 United States v. Samperyac, 209, 210, 781.
 United States v. Sayward, 5, 316.
 United States v. Sturges, 70.
 United States v. Turner, 496.
 United States v. Union Pacific Ry. Co., 845.
 United States v. Whitcomb Metallic Bedstead Co., 9.
 United States v. Wiggins, 498.
 United States v. Yorba, 499.
 United States Bank v. Dandridge, 505.
 United States Bank v. Ritchie, 223.
 United States Bank v. White, 213, 715.
 United States Exp. Co. v. Kountz, 146.
 United States Trust Co. v. Wabash Ry. Co., 640.
 Updegraff v. Crans, 589.
 Usborne v. Baker, 678.
 Utica Ins. Co. v. Lynch, 381, 384, 819.
- V.
- V. & A. Coal Co. v. Central R. Co., 665, 752.
 Vaigneur v. Kirk, 777.
 Vail v. Knapp, 553.

References are to pages.

- Van Aernam v. Van Aernam, 508.
 Van Alst v. Hunter, 785.
 Van Buskirk v. Mulock, 470.
 Van Hook v. Whitlock, 260, 275, 293, 303, 335, 374.
 Van Norden v. Morton, 148, 246.
 Van Patten v. Chicago, M. & St. P. R. Co., 104, 105.
 Van Rensselle v. Brice, 417.
 Van Riemsdyk v. Kane, 388.
 Van Wagener v. Sewell, 838.
 Van Weel v. Winston, 149.
 Van Winkle v. Crowell, 520.
 Vattier v. Hinde, 25, 183, 346, 357, 676.
 Vaughan v. Northup, 56.
 Vaun v. Barnett, 612.
 Vause v. Wood, 606, 611.
 Vegrass v. Binfield, 720.
 Vermilyea v. Bank, 67.
 Vermont Farm Machine Co. v. Converse, 730.
 Verplanck v. Mercantile Ins. Co., 61, 613.
 Verplank v. Caines, 275.
 Vetterlein v. Barnes, 54.
 Vigel v. Hopp, 385.
 Vigers v. Lord Audley, 687.
 Villabolas v. United States, 852.
 Violet v. Patton, 337.
 Virginia & Alabama Coal Co. v. Central Railroad & Banking Co., 655, 656.
 Voorhees v. Bank of United States, 505.
 Vose v. Bronson, 59.
 Vroom v. Ditmas, 739.
- W.**
- Wabash, St. L. & Pacific Ry. Co. v. Illinois, 578, 580.
 Wabash W. R. Co. v. Brow, 201.
 Wade v. Lowder, 835.
 Wager v. Stickle, 225.
 Waggoner v. Gray, 815.
 Wagner v. Baird, 258, 336.
 Wagner v. Drake, 550.
 Wake v. Parker, 254.
 Walden v. Bodley, 281, 282, 338, 339, 714, 774.
 Walker v. Beall, 54.
 Walker v. Bell, 661, 664.
 Walker v. Collins, 147.
 Walker v. Dreville, 831, 849.
 Walker v. Hallett, 678.
 Walker v. Jack, 283.
 Walker v. Locke, 264.
 Walker v. Powers, 172.
 Walker v. Robins, 199, 200.
 Walker v. Symonds, 382.
 Walker, Ex parte, 608.
 Wallace v. Loomis, 620, 625, 629, 633, 654, 658.
 Walsh v. Preston, 165.
 Walter v. Lockwood, 156.
 Walter Baker & Co. v. Baker, 676.
 Walters v. Anglo-American Mortgage Co., 651.
 Walton v. Coulson, 223, 754.
 Walton v. Hobbs, 385.
 Walton v. Low, 786, 787.
 Walwyn v. Lee, 346, 351, 352, 353.
 Ward v. Paducah & M. R. Co., 802.
 Ward v. Seabring, 435.
 Ware v. Galveston City Co., 55.
 Warner v. New Orleans, 846.
 Warner v. Texas & Pacific R. Co., 337.
 Warner Valley Stock Co. v. Smith, 675.
 Warren v. Younger, 452.
 Washington, A. & G. Packet Co. v. Sickles, 340, 342, 468, 472.
 Washington, Alexandria & Georgetown R. Co. v. Bradley, 421, 430.
 Washington, A. & G. R. Co. v. Brown, 199.
 Washington & Georgetown R. Co., In re, 869.
 Waterbury v. Sturtevant, 502, 514.
 Waterhouse v. Caines, 650.
 Watkins v. Carlton, 785.
 Watkins v. Holman, 553.
 Watson v. Jones, 327.
 Watson v. Lord Lincoln, 515.
 Watson v. Rennick, 116, 119, 133, 134, 370, 383.
 Watson v. Williams, 591.
 Watt v. Starke, 780, 781, 783, 784, 786, 787.
 Watts v. Kilbourn, 481.
 Watts v. Kinney, 80, 91.
 Watts v. Waddle, 79, 164.
 Watzell v. Arnold, 678.
 Webb v. Barnwall, 194.
 Webb v. Den, 472.
 Webber v. Whiting, 822.
 Weed v. Smull, 183, 184, 344, 345, 358, 430.
 Wells v. Wood, 405.
 Welsh v. Joy, 198.
 Wendell v. Van Rensselaer, 43.
 Werner v. Charleston, 742.
 Wessells v. Wessells, 802.
 West v. Brashear, 369.
 West v. Randall, 70, 73.
 Western Division of Western North Carolina R. Co. v. Drew, 456.
 Western Union Tel. Co. v. Ann Arbor R. Co., 840.
 Wetmore v. Rymer, 317, 319, 320, 321, 322, 323.
 Whaley v. Norton, 533.

References are to pages.

- Whalley v. Whalley, 777.
 Wharton v. Wharton, 405.
 Wheaton v. Peters, 569.
 Wheeler v. Malins, 704.
 Wherman v. Conkling, 550.
 Whittaker v. Salisbury, 480, 481.
 White v. Berry, 589.
 White v. Bower, 430.
 White v. Buloid, 422, 436.
 White v. Crow, 505.
 White v. Ewing, 109, 201, 434, 646.
 White v. Gibbs, 674, 676.
 White v. Joyce, 754.
 White v. Lincoln, 382.
 White v. Lord Westmeath, 707.
 White v. Miller, 223, 754.
 White v. Rankin, 5, 6.
 White v. Sayer, 405.
 White v. Williams, 379, 382.
 Whitebread v. Brockhurst, 291.
 Whitecar v. Michenor, 537.
 Whitehead v. Brockhurst, 373.
 Whitehead v. Shattuck, 12, 148, 245, 246, 539.
 Whitehead v. Wooten, 612.
 Whitehouse v. Partridge, 593.
 Whitesides v. Pendergrast, 653.
 Whitfield, Ex parte, 611.
 Whitford v. Clark, 451.
 Whiting v. Bank of United States, 270, 350, 739, 743, 745, 766, 767.
 Whitmore v. Amoskeag Nat. Bank, 102.
 Whitney v. Bank, 611.
 Whitney v. Cork, 756.
 Whitney v. McKinney, 70.
 Whittemore v. Patton, 129, 414.
 Whyte v. Arthur, 436.
 Wickliffe v. Clay, 430, 437.
 Wickliffe v. Eve, 552.
 Wickliffe v. Owings, 311, 313, 317, 369.
 Wigg v. Wigg, 347.
 Wiggins v. Burkham, 344.
 Wilcox v. Jackson, 577.
 Wilder v. Keeler, 680.
 Wiley v. Pistor, 431.
 Wilkes v. Rogers, 822, 823.
 Wilkin v. Wilkin, 786, 787.
 Wilkins v. Allen, 521.
 Wilkinson v. Roper, 437.
 Willan v. Willan, 799.
 Willard v. Tayloe, 164, 518.
 Williams v. Bank of the United States, 857.
 Williams v. Bankhead, 47, 255.
 Williams v. Conger, 868.
 Williams v. Corwin, 209, 210.
 Williams v. Donell, 509, 512.
 Williams v. Healy, 160.
 Williams v. Keyser, 480, 481, 483.
 Williams v. Kirtland, 79.
 Williams v. Lee, 341, 351, 352, 353, 376.
 Williams v. Llewellyn, 533.
 Williams v. Morgan, 669, 670, 750, 751, 794, 801.
 Williams v. Nottawa, 319, 320.
 Williams v. Suffolk Ins. Co., 243, 244, 499.
 Williams v. United States, 472, 505.
 Williamson v. Berry, 772.
 Williamson v. Cooke, 704.
 Williamson v. Dale, 774.
 Williamson v. Suydam, 79.
 Williamson v. Wilson, 630.
 Willis v. Jernegan, 344.
 Willoughby v. Carlton, 480, 481.
 Willow v. Willow, 797.
 Wilmington & Weldon R. Co. v. Alsbroom, 341, 468.
 Wills v. Wood, 407.
 Wilson v. Barnum, 780.
 Wilson v. Grace, 403.
 Wilson v. Hill, 156.
 Wilson v. Joseph, 553.
 Wilson v. Matthews, 336.
 Wilson v. Riddle, 781.
 Wilson v. Seligman, 192.
 Wilson v. Stolley, 25.
 Wilson v. Western Union Tel. Co., 99, 100.
 Winchester v. Beaver, 754.
 Windsor v. McVeigh, 217.
 Wing v. Goodman, 269, 430.
 Winn v. Fletcher, 325.
 Winn v. Patterson, 482.
 Winship v. Jewett, 225.
 Winter v. Ludlow, 187.
 Winters v. Claitor, 283.
 Winters v. January, 388.
 Winthrop Iron Co. v. Meeker, 741.
 Wiscart v. Dauchy, 831, 849.
 Wisconsin v. Pelican Ins. Co., 469.
 Wisner v. Ogden, 260.
 Wiswall v. Sampson, 611, 643, 665.
 Wiswall v. Wandell, 384.
 Wittbeck v. Edgar, 680.
 Wood v. Braddick, 388.
 Wood v. Guarantee Trust Co., 658.
 Wood v. Mann, 167, 311, 313, 359, 369, 465, 487.
 Wood v. Oregon Development Co., 630, 651.
 Wood v. Strickland, 361, 376.
 Wood v. Wood, 372.
 Woods, In re, 847.
 Woodbury Planing Machine Co. v. Keith, 395.
 Woodmanse & Hewitt Co. v. Williams, 40, 336.
 Woods v. Morrell, 166, 232, 379, 380, 381, 417.
 Woodward v. Jewell, 818.

References are to pages.

Woodward v. Schatzell, 593.
 Woodward v. Woodward, 686.
 Wooster v. Clark, 447.
 Worcester v. Truman, 592.
 Wormley v. Wormley, 71.
 Wortley v. Birkhead, 338.
 Wright v. Andrews, 470.
 Wright v. Carew, 334.
 Wright v. Dane, 117.
 Wright v. Miller, 223, 745, 754.
 Wright v. Taylor, 432.
 Wych v. E. India Co., 334.
 Wych v. Meal, 388.
 Wyckoff v. Sniffin, 374.
 Wyle v. Coxe, 732.
 Wylie v. Coke, 13.
 Wythe v. Myers, 317.

Y.

Yare v. Harrison, 720.
 Yates v. Farebrother, 720.
 Yates, Case of, 591.
 Yeaton v. Lenox, 852.
 Young v. Colt, 135.
 Young v. Grundy, 377.
 Young v. Montgomery & E. R. Co.,
 651.
 Youngblood v. Schamp, 543.
 Younge v. Duncombe, 720.

Z.

Zimmerman v. Franke, 553.

FEDERAL EQUITY PROCEDURE.

CHAPTER I.

BASIS OF THE EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1. Introductory.</p> <p>2. Creation of the federal judiciary.</p> <p>3. Constitutional grant of judicial power.</p> <p>4. Statutory grants of jurisdiction.</p> <p>5. Original jurisdiction of the circuit courts of the United States.</p> <p>6. Same—Jurisdiction under the bankruptcy act.</p> | <p>§ 7. Sources of the equity jurisdiction of the circuit courts of the United States.</p> <p>8. The system of equity jurisdiction and jurisprudence administered by the circuit courts.</p> <p>9. Same—Rules of decision same in all the states.</p> <p>10. Adequate remedy at law.</p> <p>11. The jurisdiction must appear upon the face of the record.</p> |
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§ 1. **Introductory.**—In every suit commenced and prosecuted in the courts of the United States the jurisdictional facts must affirmatively appear upon the face of the record;¹ a knowledge of correct procedure is inseparably connected with a knowledge of the peculiar limitations established upon the judicial power of the government; it therefore follows, as a logical necessity, that the acquisition of a comprehensive understanding of the great system of equity procedure administered in the circuit courts of the United States, and its actual application in judicial controversies, demand, as a prerequisite, a clear conception of the nature, origin and sources of the equity jurisdiction vested in those courts. It is an axiomatic legal truth that the basis of this equity jurisdiction is laid in the provisions of the federal constitution and the laws made under the authority thereof, creating the federal judiciary, and granting and limiting the judicial power of the United States, and con-

¹ *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237; *Peper v. Fordyce*, 119 U. S. 469; *Johnson v. Christian*, 125 U. S. 645.

ferring and determining the jurisdiction of the courts of the federal judicial system; and all intelligent study of procedure, and especially equity procedure, in the federal courts, should, in the very nature of things, be preceded by a critical examination of these constitutional and statutory provisions. The importance of the preliminary investigation here suggested is evidenced by the fact that a great body of judicial learning, the accretions of a century, has been developed by the judges of the courts of the United States touching their jurisdiction, which learning has been devoted largely to the construction and practical application of these constitutional and statutory provisions to the affairs of human society in controversies arising before them. There has been little or no difficulty in holding that the equity powers of the circuit courts are amply sufficient to administer full relief in all cases falling within their equity jurisdiction. The chief difficulty has been encountered in determining whether or not the particular case before the court for adjudication came within the class of controversies over which the court has been, by the constitution and laws, given jurisdiction; this has resulted from the peculiar limitations established by the constitution upon the judicial power of the United States. In *Bank v. Deveau*¹ Chief Justice Marshall said: "The judicial power of the United States, as defined in the constitution, is dependent, 1st, on the nature of the case; and 2d, on the character of the parties." And in *Cohens v. Virginia*² the same learned judge said: "In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these the nature of the case is everything, the character of the parties is nothing." It is not within the purview of this work to discuss the principles of equity jurisprudence, nor to enumerate the rights and estates which are cognizable in courts of equity; but it seems reasonable to direct attention, in the inception, to the provisions of conventional law, which form the basis of the equity jurisdic-

¹ 5 Cranch, 85.² 6 Wheat. 264.

tion of the circuit courts of the United States, as introductory to the study of equity procedure in those courts.

§ 2. Creation of the federal judiciary.—The federal constitution provides that: “The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish.”¹ By the judiciary act of September 24, 1789,² the congress created, ordained and established district courts and circuit courts; and under this act the judiciary system of the United States was fully organized, and went into immediate active operation; by act of February 24, 1855,³ the court of claims was created and established; and by the act of March 3, 1891,⁴ the congress created, ordained and established a United States circuit court of appeals in and for each circuit, and under the act these courts were at once organized and went into active operation. The circuit courts of the United States are not “inferior courts” in the common-law or technical sense; they are so only in the sense of the federal constitution, and in subordination to the supreme court; and their judgments and proceedings are not to be regarded and interpreted in the light of the common-law rules applicable to inferior common-law courts.⁵

§ 3. Constitutional grant of judicial power.—The constitutional grant of judicial power is as follows: “The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors or other public ministers and consuls; all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or citizens thereof, and foreign states, citizens or subjects.

¹ U. S. Const., art. 3, sec. 1.

² 1 U. S. Stat. at L., ch. 20, p. 73 et seq.

³ U. S. R. S., sec. 1040 et seq.

⁴ 26 U. S. Stat. at L., ch. 517, p. 828 et seq.

⁵ *Livingston v. Van Ingen*, 1 Paine, 45, Fed. Cas. No. 8,420; *Turner v. Bank of North America*, 4 Dall. 8; *McCormick v. Sullivan*, 10 Wheat. 192; *Kempe's Lessees v. Kennedy*, 5 Cranch, 173.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."¹

To meet the decision of the supreme court in the case of *Chisholm's Ex'rs v. Georgia*,² and to place a limitation upon the judicial power in that regard, the constitution was amended as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."³

It will be seen that, although the constitution has defined the limits of the judicial power of the United States, yet it has not prescribed how much of that power shall be exercised by the circuit courts, nor defined their jurisdiction, leaving this to be determined by act of congress.⁴

§ 4. **Statutory grants of jurisdiction.**—The judiciary act of September 24, 1789,⁵ conferred upon the circuit courts original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law and in equity, in certain classes of controversies enumerated in that statute. Subsequent legislation conferred additional jurisdiction upon the circuit courts; these statutes, with their amendments, were revised, consolidated and carried into the Revised Statutes.⁶ After the revision, and on March 3, 1875, an act was passed by congress entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes;"⁷ this act was amended March 3, 1887;⁸ and the last-named act was amended August 13, 1888.⁹ The act of March 3, 1875, did not repeal or displace any part of section 629 of the Revised Statutes, except the first paragraph thereof; and the acts of March 3,

¹ U. S. Const., art. 3, sec. 2.

² 2 Dall. 419.

³ U. S. Const., 11th Amend.

⁴ *Sheldon v. Sill*, 8 How. 446; *Smith v. Jackson*, 1 Paine, 453, Fed. Cas. No. 13,064.

⁵ 1 U. S. Stat. at L., ch. 20, p. 73 et seq.

⁶ U. S. R. S., sec. 629 et seq.

⁷ 18 U. S. Stat. at L., ch. 137.

⁸ 24 U. S. Stat. at L., ch. 373.

⁹ 25 U. S. Stat. at L., ch. 866.

1887, and of August 13, 1888, being amendatory of the act of March 3, 1875, said section 629 of the Revised Statutes, except the first paragraph, remains in full force.¹ The general jurisdiction of the circuit courts of the United States is now defined and determined by chapter 7 of title 13 of the United States Revised Statutes, and the three acts of congress last above named. There are some other special statutes giving jurisdiction to the circuit courts.

§ 5. Original jurisdiction of the circuit courts of the United States.—The circuit courts of the United States have original jurisdiction in the following suits, viz.:

(1) Of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority.²

(2) Of all suits of a civil nature, at common law or in equity, in which the United States are plaintiffs or petitioners, without regard to the sum or value of the matter in dispute.³

(3) Of all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.⁴

(4) Of all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of the same state, claiming lands under grants of different states, without regard to the sum or value of the matter in dispute.⁵

(5) Of all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects, in which the mat-

¹ *Miller-Magee Co. v. Carpenter*, 34 Fed. R. 433; *White v. Rankin*, 144 U. S. 628; *Ames v. Hager*, 36 Fed. R. 129; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Armstrong v. Trantam*, 36 Fed. R. 275; *McConville v. Gilmour*, 36 Fed. R. 277.

² 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 493, 498.

³ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 494.

⁴ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

⁵ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 494.

ter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.¹

(6) Of all suits commenced by the United States, or by direction of any officer thereof, against any national bank, or suits for winding up the affairs of any such bank, without regard to the sum or value of the matter in dispute.²

(7) Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws, without regard to the amount or value of the matter in dispute.³

(8) Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels, without regard to the amount or value of the matter in dispute.⁴

(9) Of all proceedings for the condemnation of property taken as prize, in pursuance of section 5308, title "Insurrection," without regard to the amount or value of the matter in dispute.⁵

(10) Of all suits for the enforcement of forfeitures and for the seizure or condemnation of any property under any law relating to the slave or cooly trade, without regard to the amount or value of the matter in dispute.⁶

(11) Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture, without regard to the amount or value of the matter in dispute.⁷

(12) Of all suits at law or in equity arising under the patent or copyright laws of the United States, without regard to the sum or value of the matter in dispute.⁸

¹ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

² 25 U. S. Stat. at L., ch. 866, sec. 4, p. 436.

³ U. S. R. S., sec. 629.

⁴ U. S. R. S., secs. 629, 4270, 4540 and 4610.

⁵ U. S. R. S., secs. 629, 5308, 5309.

⁶ U. S. R. S., secs. 629, 2159, 5555, 5556.

⁷ U. S. R. S., secs. 629, 3039.

⁸ U. S. R. S., secs. 629, 4970; *White v. Rankin*, 144 U. S. 628; *Belford v. Scribner*, 144 U. S. 488.

(13) Of all suits brought by any banking association established in the district for which the court is held under the provisions of title "The National Banks," to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided in said title, without regard to the amount or value in dispute.¹

(14) Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenue thereof, or to enforce the rights of citizens of the United States to vote in the several states, without regard to the amount or value of the matter in dispute.²

(15) Of all suits to recover possession of any office, except that of elector of president or vice-president, representative or delegate in congress, or member of state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color or previous condition of servitude: Provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the states.³

(16) Of all proceedings by writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment to the constitution of the United States.⁴

(17) Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several states.⁵

(18) Of all suits authorized by law to be brought by any person to redress the deprivation, under any color of any law, statute, ordinance, regulation, custom or usage of any state, of

¹ U. S. R. S., secs. 629, 5237.

⁴ U. S. R. S., secs. 629, 1786.

² U. S. R. S., sec. 629.

⁵ U. S. R. S., sec. 629.

³ U. S. R. S., secs. 629, 2010.

any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.¹

(19) Of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1980, title "Civil Rights."²

(20) Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section 1980 are about to be done, and having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.³

(21) Of all proceedings within their respective districts for the condemnation of real estate for use by the United States government.⁴

(22) Of suits against the government of the United States, concurrent with the court of claims, to determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable, and of all set-offs, counter-claims, claims for damage, liquidated or unliquidated, or other demand whatsoever on the part of the government of the United States against any claimant against the government in said courts, where the amount of such claim exceeds \$1,000 and does not exceed \$10,000: Provided, said courts shall not have jurisdiction to hear and determine war claims, or any other claims which were rejected or reported on adversely by any court, department or commission authorized to hear and determine the same prior to March 3, 1887.⁵

¹ U. S. R. S., secs. 629, 1979.

² U. S. R. S., sec. 629.

³ U. S. R. S., secs. 629, 1981.

⁴ 25 U. S. Stat. at L., ch. 728, p. 357.

⁵ 24 U. S. Stat. at L., ch. 359, p. 505;
United States v. Jones, 131 U. S. 1;
United States v. Drew, 121 U. S. 21.

(23) Of suits for the recovery of the penalty of \$1,000 for any violation of the act prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and District of Columbia.¹

(24) Of suits by the United States for the recovery of the possession of their public lands held by persons and corporations in violation of the act to prevent unlawful occupancy of such lands.²

(25) Of proceedings to review the decision of questions of law and of fact made by the general board of appraisers in determining the classification of merchandise imported into the United States and the rate of duty due thereon under such classification.³

(26) Of suits in equity to restrain violations of the acts to protect trade and commerce, and the import trade, against unlawful restraints, agreements, trusts, monopolies and conspiracies; and of suits for damages brought by any person injured in his business or property against any other persons or corporations done by them and forbidden or declared unlawful by said acts, without respect to the amount in controversy.⁴

(27) Of suits in equity brought by one tenant in common or joint tenant for partition of lands in cases where the United States are one of such tenants, such suit to be brought in the district where the land is situated.⁵

§ 6. Same — Jurisdiction under the bankruptcy act.—

The bankruptcy act contains the following provisions:

“(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only

¹ 23 U. S. Stat. at L., ch. 164, p. 332; In re Deckerhoff, 45 Fed. R. 235; In
² 26 U. S. Stat. at L., ch. 551, p. 1084; re Blumlein, 45 Fed. R. 236; In re
 United States v. Mexican Nat. Ry. Downing, 45 Fed. R. 412.
 Co., 40 Fed. R. 769; United States v.
 Whitcomb Metallic Bedstead Co., 45
 Fed. R. 89.

² 23 U. S. Stat. at L., ch. 149, p. 321.

³ 26 Stat. at L., ch. 407, sec. 15, p. 138;

⁴ 26 U. S. Stat. at L., ch. 647, p. 209;
 28 U. S. Stat. at L., ch. 349, secs. 73-77,
 p. 570; United States v. Jellico Mountain Coal & Coke Co., 46 Fed. R. 432.

⁵ 30 U. S. Stat. at L., ch. 339, p. 416.

as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

“(b) Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent.”¹

§ 7. Sources of the equity jurisdiction of the circuit courts of the United States.—The equity jurisdiction of the circuit courts is dependent alone upon the constitution and laws of the United States. On this point the terse and comprehensive language of Judge McCrary is here given: “It has long been settled that the jurisdiction of the circuit courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the states, and is not affected or varied by the various statutes of the states whereby the chancery powers and jurisdiction of state courts may be defined and regulated. This court cannot, therefore, look to any state legislation as the source of its equity jurisdiction.” The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished or affected by state laws or regulations. The local laws of a state can never confer jurisdiction on the courts of the United States; they can only furnish rules to ascertain the rights of the parties, and thus assist in the administration of the proper remedies where the jurisdiction is vested by the laws of the United States.²

§ 8. The system of equity jurisdiction and jurisprudence administered by the circuit courts.—The remedies in the circuit courts of the United States are at common law or in

¹ 30 U. S. Stat. at L., ch. 541, sec. 23, p. 544.

² *Strettel v. Ballow*, 9 Fed. R. 256; *American Ass'n, Lim., v. Eastern Kentucky Land Co.*, 68 Fed. R. 721; *United States v. Drennen*, Hemp. 320, Fed. Cas. No. 14,992; *The Orleans v. Phoebus*, 11 Pet. 175; *Carey v. Curtis*, 3 How. 393; *Livingston v.*

Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; *Scott v. Sandford*, 19 How. 393-633; *Scott v. Neely*, 140 U. S. 106; *Gormley v. Clark*, 134 U. S. 338; *Ridings v. Johnson*, 128 U. S. 212; *New Orleans v. Louisiana Construction Co.*, 129 U. S. 145; *Scott v. Armstrong*, 146 U. S. 499; *Northern Pac. R. Co. v. Paine*, 119 U. S. 561.

equity not according to the jurisdiction and procedure of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we have derived our knowledge of those principles. The equity jurisdiction and equity jurisprudence administered in the circuit courts of the United States are coincident and co-extensive with that exercised in England, and are not regulated by the municipal jurisprudence of the states where the court sits. And the settled doctrine of the supreme court of the United States is that the remedies in equity are to be administered, not according to the state practice, but according to the practice of the courts of equity in the parent country, as contradistinguished from the courts of common law; subject, of course, to the provisions of the act of congress, and to such alterations and rules as, in the powers delegated in those acts, the courts of the United States may from time to time prescribe. And circuit courts of the United States will exercise their equity jurisdiction and apply their equitable remedies for the protection and preservation of equitable rights and estates, although the state where the court sits does not exercise a like jurisdiction nor administer like remedies.¹

§ 9. Same — Rules of decision same in all the states.— The equity jurisdiction given by the constitution and laws of the United States to the circuit courts being the same in all the states of the Union, their rules of decision are the same in all the states; and the decisions of state courts involving only the general principles of equity, and not controlled by local law or usage, are not binding authority on the courts of the United States.² But the title to real estate and a construction of deeds and statutes in respect thereto are matters of local law, and the supreme court of the United States follows as a rule the decisions of the highest court of the state in regard to the

¹ Robinson v. Campbell, 3 Wheat. 212; Boyle v. Zacharie, 6 Pet. 658; United States v. Howland, 4 Wheat. 115; Neves v. Scott, 13 How. 271; Story v. Livingston, 13 Pet. 357; Noonan v. Lee, 2 Black, 499; Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864.

² Neves v. Scott, 13 How. 268; United States v. Howland, 4 Wheat. 115; Boyle v. Zacharie, 6 Pet. 658; Robinson v. Campbell, 3 Wheat. 222; Livingston v. Story, 9 Pet. 654; Russell v. Southard, 12 How. 239.

same; and the law of a state as declared by its supreme court is controlling as a rule of property.¹

§ 10. Adequate remedy at law.—The sixteenth section of the original judiciary act declared “that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”² This legislation introduced no new rule in regard to the limitation upon equitable remedies; it is simply declaratory of the rule which has existed in England ever since the adoption of equitable remedies in that country; and the adequate remedy at law, the absence of which is, by this statute, made the test of equitable jurisdiction in the courts of the United States, is that which existed at the time the statute was adopted, unless changed by subsequent legislation;³ and this rule, as interpreted by the supreme court of the United States, is that “whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury;”⁴ the statutory declaration of the rule was intended to emphasize it, and to impress it upon the attention of the courts;⁵ in order to defeat the equity jurisdiction the remedy at law must be as practical and as efficient to the ends of justice and its prompt administration, both in respect to the final relief and the mode of obtaining it, as the remedy which equity would confer under the same circumstances.⁶

¹ Halstead v. Buster, 140 U. S. 273; Jenks v. Quidnick Co., 135 U. S. 457.

Bay & M. Canal Co., 124 U. S. 254; ² 1 U. S. Stat. at L., ch. 20, sec. 16, p. 82; U. S. R. S., sec. 723.

Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258; Hanrick v. Patrick, ³ McConihay v. Wright, 121 U. S. 201; Whitehead v. Shattuck, 138 U. S. 146.

U. S. 212; Clement v. Parker, 125 U. S. 309; Gormley v. Clark, 134 U. S. 338; Parker v. Dacres, 130 U. S. 43; Byers v. McAuley, 149 U. S. 608; Peters v. Bain, 133 U. S. 670; St. Louis v. Rutz, 138 U. S. 226; Barney v. Keokuk, 94 U. S. 324; Parker v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Cross v. Allen, 141 U. S. 528; ⁴ Buzard v. Houston, 119 U. S. 347; Hipp v. Babin, 19 How. 271; Lewis v. Cocks, 23 Wall. 466; Roat v. Railway Co., 105 U. S. 189; Killian v. Ebbinghaus, 110 U. S. 568.

⁵ N. Y. Guaranty Co. v. Memphis Water Co., 107 U. S. 205.

⁶ Tyler v. Savage, 143 U. S. 79; Kil-

§ 11. The jurisdiction must appear upon the face of the record.—The jurisdiction of the circuit court is limited, in the sense that it has no jurisdiction other than that conferred upon it by the constitution and laws of the United States; and, as a result of this limitation upon the jurisdiction, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. It has long been settled that the facts upon which the jurisdiction of the circuit courts rests must, in some form, appear upon the face of the record in all suits prosecuted before them, and it is error for the court to proceed until its jurisdiction is shown.¹ •

Chief Justice Taney, discussing the necessity of the record showing the jurisdiction, and the reason of the rule, said: "But in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different states of the Union which have adopted the common-law rules. In these last mentioned courts, where their character and rank are analogous to that of a circuit court of the United States—in other words, where they are what the law terms 'courts of general jurisdiction,'—they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and, unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court. Now, it is not necessary to inquire whether in courts of that description a party who pleads over in bar, when a plea to the juris-

bourn v. Sunderland, 130 U. S. 505; Boyce v. Grundy, 3 Pet. 210; Sullivan v. Portland & K. R. R. Co., 94 U. S. 806; Wylie v. Coke, 15 How. 415.

¹Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, and authorities cited; Railway Co. v. Swan, 11 U. S. 379; Grace v. American Cent. Ins. Co., 109 U. S. 278; Scott v. Sandford, 19 How.

393 et seq.; Fishback v. Western Union Teleg. Co., 161 U. S. 96; Stevens v. Nichols, 130 U. S. 230; Chapman v. Barney, 129 U. S. 677; Cameron v. Hodges, 127 U. S. 322; Anderson v. Watt, 128 U. S. 694; Tennessee v. Union & P. Bank, 152 U. S. 454; Metcalf v. Watertown, 128 U. S. 586.

diction has been ruled against him, does or does not waive his plea; nor whether upon a judgment in his favor on the pleas in bar, and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common-law pleaders, can have no influence in the decision in this court. Because, under the constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws. This difference arises, as we have said, from the peculiar character of the government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the constitution, have been conferred upon it; and neither the legislative, executive nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the circuit court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law English or state court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the constitution, to hear and determine the case.”¹

¹ Scott v. Sandford, *supra*.

CHAPTER II.

SYSTEM AND SOURCES OF EQUITY PROCEDURE ADMINISTERED IN THE CIRCUIT COURTS OF THE UNITED STATES.

§ 12. Statutes adopting and regulating equity procedure in the United States circuit courts.	Court of Chancery in England.
13. Supreme court authorized by statute to make equity rules.	§ 19. Circuit courts may make equity rules.
14. First equity rules promulgated by the supreme court.	20. Equity procedure same in all the states.
15. Same — Rules now in force.	21. Authorities upon equity procedure in the circuit courts.
16. Procedure of the High Court of Chancery in England adopted.	22. Same—Chancellor Kent's opinions.
17. Same — Explanation of equity rule 90 by the supreme court.	23. Ancient English equity pleading.
18. Same — Orders of the High	24. The matured English equity pleading.

§ 12. Statutes adopting and regulating equity procedure in the United States circuit courts.—The original judiciary act is silent upon the subject of equity procedure; the act to regulate process in the courts of the United States, approved September 29, 1789, just five days after the approval of the judiciary act, provided that “the forms and modes of proceedings in causes of equity and of admiralty and maritime jurisdiction shall be according to the course of the civil law;”¹ by section 2 of an act approved May 8, 1792,² it was declared that the forms of writs, executions and other process, and the forms and modes of proceedings in suits of equity and admiralty and maritime jurisdiction, shall be according to the principles, rules and usages which belong to courts of equity and courts of admiralty, respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.

¹ 1 U. S. Stat. at L., ch. 21, sec. 2, pp. 93, 94.

² 1 U. S. Stat. at L., ch. 36, sec. 2, p. 276.

Additional legislation was had upon the subject by acts of congress approved May 19, 1828, August 1, 1842, and June 1, 1872, respectively. These various acts were revised and consolidated, and carried into the Revised Statutes in the following form: "The forms of mesne process and the forms and modes of proceedings in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."¹

§ 13. Supreme court authorized by statute to make equity rules.—The act of May 8, 1792, authorized the supreme court to prescribe rules to the circuit and district courts in suits in equity and admiralty, and this authority was amplified and extended by subsequent statutes. The legislation upon the subject, as revised and consolidated, is as follows:

"The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other processes, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering and enrolling decrees, and of proceedings before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts."²

§ 14. First equity rules promulgated by the supreme court.—In March, 1822, the supreme court, under the authority given to it by the act of May 8, 1792, promulgated thirty-three rules "to be the rules of practice for the courts of equity of the United States." These rules provided for the holding of monthly rules in the clerk's office on the first Monday in every month, and the regulation of the filing of pleadings, the

¹ U. S. R. S., sec. 913.

² U. S. R. S., sec. 917.

issue, execution and return of process, the taking of decrees *pro confesso*, the regulation of proceedings in the master's office, and the taking of testimony; but those rules covered but few points of practice, and were, in several respects, materially variant from the equity rules now in force.¹

§ 15. Same — Rules now in force.— On March 2, 1842, the supreme court promulgated ninety-one equity rules, to take effect August 1, 1842, and which, with a few amendments and additions, are now in force in the circuit courts of the United States; these rules supersede the rules of March, 1822, and regulate, to some extent, and in some particulars, almost every step and proceeding in suits in equity, from their commencement to their conclusion; many of them were taken from the English chancery orders then in force.

§ 16. Procedure of the High Court of Chancery in England adopted.— Equity rule 33, adopted March, 1822, is as follows: "In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England." The act of May 8, 1792, and the rule just quoted, were effectual to adopt the equity procedure of the English High Court of Chancery in all cases not covered by a law of congress or rule of court.² Equity rule 90, adopted March 2, 1842, is as follows: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and the local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

§ 17. Same — Explanation of equity rule 90 by the supreme court.— Between March, 1822, the date of the promulgation of the first equity rules, and March, 1842, the date of the promulgation of equity rule 90, there were many and material changes in the procedure of the High Court of Chancery in England; and it therefore has become important to know

¹7 Wheat., v.

²Story v. Livingston, 13 Pet. 359.

to which one of these dates we are to look in order to determine the exact limitations and modification of the procedure adopted by rule 90; in this we are not left without a guide. The language of the rule is: "The present practice of the High Court of Chancery in England;" that is, the practice as it existed on March 2, 1842, when rule 90 was adopted. To a case decided by the supreme court in 1884, there is a note by the court explanatory of rule 90. The note is as follows: "Reference is made to the first edition of Daniell (published 1837) as being, with the second edition of Smith's Practice (published in the same year), the most authoritative of English chancery practice in use in March, 1842, when our equity rules were adopted. Supplemented by the general orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our rules), they exhibit that 'present practice of the High Court of Chancery in England,' which by our ninetieth rule was accepted as the standard of equity practice in cases where the rules prescribed by this court or the circuit court do not apply. The second edition of Mr. Daniell's work, published by Mr. Headham in 1846, was much modified by the extensive changes introduced by the English orders of May 8, 1845; and the third edition by the still more radical changes introduced by the orders of April, 1850, the statute of 15 and 16 Vict. (ch. 86), and the general orders afterwards made under the authority of that statute. Of course the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have on that account a value of their own, provided one is not misled by the new portions."¹

§ 18. Same — Orders of the High Court of Chancery in England.—From the above interpretation of the ninetieth equity rule by the supreme court, it would seem that the general orders of the High Court of Chancery in England which were in force on March 2, 1842, are, when they may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, in cases not covered by our own rules, an essential element of the system

¹ Thompson v. Wooster, 114 U. S. 104, 112.

of equity procedure adopted for the circuit courts of the United States; these orders furnish clear, decisive and salutary rules to guide the profession upon a large number of matters of procedure, and are, in many instances, an embodiment of the results of the English chancery decisions.

§ 19. Circuit courts may make equity rules.—The second section of the act of May 8, 1792, authorized the circuit courts to regulate their proceedings in suits in equity, which statute was in this, as in other respects, several times amended, and, with its amendments, was revised and carried into the Revised Statutes in the following form: “The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section (sec. 917), make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.”¹ And it is provided by an equity rule that “the circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.”² The circuit courts cannot make any rule in equity which is in conflict with any rule prescribed by the supreme court, or inconsistent with any law of the United States.³ Courts may change their procedure without promulgating any formal written rules; uniform modes of procedure continued for a series of years constitute rules of court equally with those established by formal order.⁴

§ 20. Equity procedure same in all the states.—The forms of mesne process and the forms and modes of proceedings in suits in equity in the circuit courts of the United States are

¹ U. S. R. S., sec. 918.

² Equity Rule 89.

³ Story v. Livingston, 13 Pet. 359;

Heath, 12 How. 168; U. S. R. S., secs. 913, 917 and 918.

⁴ Duncan v. United States, 7 Pet. Bank v. White, 8 Pet. 262; Bein v. 435.

the same in all the states of the Union, and are not in any manner regulated or controlled by the equity procedure of the states. It has long been the settled doctrine of the supreme court of the United States that the remedies in equity in the circuit courts of the United States are to be administered, not according to state procedure, but according to the procedure of courts of equity in the parent country, as contradistinguished from the courts of law, subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated in those acts, the courts of the United States may from time to time prescribe.¹

§ 21. Authorities upon equity procedure in the circuit courts.—The federal statutes and equity rules are absolutely controlling upon all points covered by them; and the decisions of the supreme court in construing the rules and statutes, and in ascertaining, declaring and applying the principles, rules, usages and forms of the equity procedure of the English High Court of Chancery, are conclusive upon all the courts of the United States. But as questions of procedure are first raised in the circuit courts, and only a small proportion of those questions are ever carried up to the appellate courts for revision, the profession must resort chiefly to the reports of the decisions of the circuit courts and the circuit court of appeals for the learning upon equity procedure. The first edition of Daniell's Chancery Practice and the second edition of Smith's Chancery Practice both have been specially mentioned by the supreme court² as authority in the courts of the United States touching matters of equity procedure; of course, much of the matter in these books is obsolete, much is inapplicable to local conditions and the constitution of our courts, and much of it has been superseded by our equity rules and the English orders in force at the time of their adoption, and which constitute a part of the English system of equity procedure, upon which, as a foundation, our equity system has been established.

¹ Robinson v. Campbell, 3 Wheat. Story v. Livingston, 13 Pet. 36; Poultney v. City of Lafayette, 12 Pet. 474; Wheat. 115; Neves v. Scott, 13 How. Bein v. Heath, 12 How. 168.
27; Boyle v. Zacharie, 6 Pet. 658; ² 114 U. S. 112.

§ 22. **Same — Chancellor Kent's opinions.**— In an address upon "The Use and Value of Authorities," before the students of the law department of the University of Pennsylvania, on October 1, 1888, by Hon. Samuel F. Miller, then the senior associate justice of the supreme court of the United States, he said: "So any one of the cases decided by Chancellor Kent in the seven volumes of Johnson's Chancery Reports will stand, so far as it applies, as almost conclusive of the principles of equity jurisprudence in the High Court of Chancery of England."¹ What Justice Miller has said of the opinions of Chancellor Kent in regard to the principles of equity jurisprudence is equally true in regard to the principles, rules, usages and forms of the equity procedure of the High Court of Chancery of England. The old New York chancery system, like the equity system of the United States courts, was built upon the English chancery system; and the general frame and features of a suit in the New York chancery courts, and many of its minor incidents, under the chancery rules of that state, were substantially the same as in a suit in equity in the circuit courts of the United States; and not only the opinions of Chancellor Kent, but also the opinions of Chancellor Walworth, and, indeed, the whole of the New York Chancery Reports, when used with discriminating care and a due regard to the differences between the New York chancery rules and the United States equity rules, are of very great utility and value upon questions of federal equity procedure and pleading.

§ 23. **Ancient English equity pleading.**— The great system of English equity pleading and procedure, like all administrative systems, had its crude beginning, followed by growth, development and maturity; and in this system as at the present time administered in the circuit courts of the United States, we behold the splendid evolution of the law. In the common-law courts, personal actions were commenced by original writ, which was a mandatory letter from the king in chancery, sealed with the great seal, and by the possession of which, when served and returned, the court was "seized of the cause," and had jurisdiction to entertain it.² But when the equitable jurisdiction arose and assumed definite form, and the court of

¹ American Law Review, vol. 23, No. 2, p. 168.

² 1 Tidd, Prac. 93-99.

chancery became established as a separate court for the administration of this extraordinary jurisdiction, suits were commenced there by the filing of a petition or bill. At first the bill was very brief and simple; it contained a concise and simple statement of the facts of the plaintiff's case, without any attempt to anticipate the defense of the defendant, and concluded with a prayer for a subpoena; if the chancellor was of opinion that the bill presented a case calling for the interposition of the court, the subpoena issued, requiring the defendant to appear in person in chancery on a day named, "to answer to what should then and there be objected to him." It seems that from the very first, as one of the means to relief, discovery by the defendant was compelled; when the defendant appeared he was examined personally before the chancellor, and at the same time made his defense to the suit by plea or answer, which was a brief statement of the facts relied on by him to bar or defeat the relief sought by the bill. The English lawyers attempted to introduce into the court of chancery the common-law system of pleading with all its technical rules. That system sought to attain three results, viz.: (1) The production of a single, certain, material issue of fact; (2) the complete separation of issues of fact from issues of law; and (3) the trial of all issues of fact by a jury, and the trial of issues of law by the presiding judge.¹ It was, by its essential constitution, unsuited as a procedure to the administration of the equitable jurisdiction in chancery, where all issues both of fact and of law were decided by the chancellor, and justice was administered upon broad and liberal principles, unrestrained by the technical rules of the common law. The attempt to introduce the common-law pleadings was resisted by the chancellors with a measure of success; but there was, nevertheless, established and for years maintained in the court of chancery a system of special pleading analogous to the common-law pleading, but less technical and rigid. This ancient system of special equity pleading, covering the entire range and bearing the very names of common-law allegations from plea to surrebutter, was borrowed from the latter system, but being found unsuited to the purpose was abandoned. It is set forth by the writers on the subject as follows: "A replication is the plaint-

¹ Stephen's Pl. (9th ed.), 127, 135, 136, 137.

iff's answer or reply to the defendant's plea or answer. Formerly, if the defendant, by his plea or answer, offered new matter, the plaintiff replied specially to the new matter; otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication. If the parties were not then at issue by reason of some new matter disclosed in the rejoinder which required an answer, the plaintiff might surrejoinder to the rejoinder; and the defendant might in like manner rebut to the surrejoinder." Another statement of the ancient pleading is as follows: "The bills were formerly of a very simple character, not taking any notice of the real or supposed defense which would be set up by the defendant. The defense came out upon a plea; and the replication stated the matter in avoidance of the plea; and then the rejoinder denied the matter in the replication; and the parties were then at issue. When, for example, according to the old practice, a plaintiff by his bill stated a case for relief, if there had been a former decree on the merits, which he sought to set aside on account of fraud in obtaining the decree, the bill did not in any manner whatsoever allude to the decree. It was left to the defendant to plead the decree as a defense, barring the plaintiff's right. And the plaintiff then by his replication would reply that the decree had been obtained by fraud; by which the plaintiff would admit that the decree was a bar, if not capable of impeachment on the ground of fraud. The defendant would by his rejoinder avoid or deny the charge of fraud, and sustain the decree; and the issue would be simply on the fact of fraud. The pleadings in ancient times frequently proceeded to a surrejoinder and rebutter."¹

§ 24. The matured English equity pleading.—"The inconvenience, delay and unnecessary length of pleading, arising from the various allegations on each side," in the system

¹ 1 Spence, 367-377; 2 Daniell, 387; Mitford, 382; Story's Eq. Pl., secs. 676, 677, 878.

of special pleading that anciently obtained in the court of chancery, "occasioned an alteration in the practice. Special replications, with all their consequences," were abandoned, and have long been disused; and, according to the matured system of equity pleading which followed, as a logical development upon the abandonment of the ancient system, "the plaintiff is to be relieved according to the form of the bill, whatever new matters may have been introduced by the defendant's plea or answer. But if the plaintiff conceives, from any matter offered by defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend the bill, and suit it to his cause, as he shall be advised. To this amended bill the defendant may make such defense as he shall think proper, whether required by the plaintiff to answer or not."¹ An equity rule provides that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court or a judge thereof may, in his discretion, direct;"² and it is provided by another equity rule that, "in every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court."³ The principles embodied in these rules were a part of the English equity pleading and procedure long before the promulgation of our equity rules. The pleadings in equity in the matured system consist of the bill, answer or plea, and the general replication, and demurrers to bills only; the general replication introduces no new matter, but simply puts in issue the defendant's plea or answer, and closes the pleadings for the proofs.⁴ The disuse of special replications and other special pleadings resulted, necessarily, in great and material changes in the frame and structure of bills and answers; under this change the bill performs "the double function of a bill

¹2 Daniell, 388; Mitford, 382, 383;
Story, Eq. Pl., sec. 378.

² Equity Rule 45.

³ Equity Rule 46.

⁴ Story, Eq. Pl., sec. 878; Humes
v. Scruggs, 94 U. S. 22; Cavender v.
Cavender, 114 U. S. 464.

and of a replication," and the answer of defendant performs "the double function" of an answer and a rejoinder. "The bill, instead of relying solely on the matter constituting the plaintiff's original case, proceeds to anticipate the defense; and charges facts to avoid that defense;" . . . "and requires a discovery as to the matter charged." The change in the structure of the bill required a corresponding change in the defense of defendant.¹ Instead of the special pleadings, as formerly, we have, in the matured system, bills and amended bills; answers and amended or supplemental answers. An amended bill, by setting up by way of pretense the new matter brought forward in defendant's answer, and avoiding it by counter averments, is often made to perform the functions of a special replication under the old system;² and an amended or supplemental answer is made to perform the functions of a rejoinder, as that pleading was formerly used;³ and though the original bill or answer, and the amendments thereto, are separately engrossed, yet the original pleading and its amendments, or supplement in the case of an answer, constitute but one pleading or record.⁴

¹ Story, Eq. Pl., sec. 678.

ham, 5 How. 233; Dupont v. Mussy,

² Story, Eq. Pl., sec. 878; Storms v. Storms, 1 Edw. Ch. 358; Marsteller v. McLean, 7 Cranch, 156; Wilson v. Stolley, 4 McLean, 275; Vattier v. Hinde, 7 Peters, 252; Piatt v. Vattier, 9 Peters, 405; Taylor v. Ben-

4 Wash. 128.

³ Equity Rule 46; 2 Daniell, 335, 336.

⁴ 1 Daniell, 509; 2 Daniell, 336; Story, Eq. Pl., sec. 868; French v. Stewart, 22 Wall. (89 U. S.) 247.

CHAPTER III.

INTERLOCUTORY PROCEDURE BEFORE THE CLERK AT RULES AND BEFORE THE JUDGES AT CHAMBERS.

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| <p>§ 25. Circuit courts as courts of equity always open.</p> <p>26. The clerk to hold monthly rules and grant certain orders and proceedings.</p> <p>27. Orders by the judges at chambers and at rules.</p> <p>28. The order book.</p> <p>29. Same — Notice.</p> <p>30. Policy and method of the interlocutory procedure.</p> <p>31. Same — When pleadings are to be filed.</p> | <p>§ 32. Same — When exceptions to pleadings for scandal and impertinence are to be filed.</p> <p>33. Same — When exceptions to answers for insufficiency are to be filed.</p> <p>34. Default of parties in interlocutory procedure.</p> <p>35. Interlocutory procedure upon removal.</p> <p>36. Purposes of the first, second and third chapters.</p> |
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§ 25. Circuit courts as courts of equity always open.—

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules and other proceedings preparatory to hearing of all causes upon their merits. Interlocutory orders and proceedings in suits in equity are of two kinds, viz.: (1) Those which are grantable of course, and may be obtained by suitors without the allowance or order of the court or any judge thereof; and (2) those which are special and not grantable of course, and can be obtained by suitors only upon the allowance of the court or a judge thereof. And all interlocutory motions, orders, rules and proceedings are intended, by the rules, to prepare causes for hearing upon their merits, and should be adapted to that end.¹ The interlocutory procedure provided for and established by the equity rules was framed with a view of speeding causes to a final hearing, and is admirably adapted to that end; and this system of procedure, when viewed with reference to the purpose had in view by those eminent and learned jurists

¹ U. S. R. S., sec. 638; Equity Rules 1, 3, 5.

through whose labor and care it has been established and perfected, must be regarded as the very consummation of human skill and learning, and it is much to be regretted that these rules are so often neglected in the conduct of causes; for the greatest complications that arise in equity suits are usually in the procedure preparatory to the hearing on the merits.

§ 26. **The clerk to hold monthly rules and grant certain orders and proceedings.**—“The clerk’s office shall be open and the clerk shall be in attendance therein on the first Monday in every month for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the” equity rules prescribed by the supreme court.¹ Parties to suits are, by virtue of the mere force and authority of the equity rules, entitled, as a matter of absolute right, to all orders and proceedings grantable of course, and the clerk is required by the rules to grant and enter them, on rule-days or in vacation, according as the rules may direct, without any notice to the adverse party, or any order of the court or a judge thereof.² All motions and applications in the clerk’s office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk’s office which do not, by the equity rules, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court.³ Following are some of the motions and applications grantable by the clerk, viz.: If defendant make default in filing his plea, demurrer or answer, the clerk may make and enter an order that the bill be taken *pro confesso*;⁴ an order to amend plaintiff’s bill before answer, plea or demurrer filed thereto;⁵ an order to amend the answer of defendant before a replication is filed thereto, or the cause is set down for hear-

¹ Equity Rule 2.

² Equity Rules 1, 2.

³ Equity Rule 5.

⁴ Equity Rules 18, 34, 46.

⁵ Equity Rule 28.

ing upon bill and answer;¹ an order dismissing the plaintiff's bill, upon his failure to file his replication to defendant's answer at the time required by the rules;² or upon his failure to reply to any plea or to set down any plea or demurrer for argument at the time required by the rules;³ an order setting down for argument any plea or demurrer,⁴ or any exception to any answer for insufficiency,⁵ or a suggestion by defendant in his answer that the bill is defective for want of parties.⁶ But any order, rule or other proceeding granted by the clerk may be suspended or altered or rescinded by any judge of the court, upon special cause shown.⁷ Upon the filing of a bill, the clerk shall, upon the application of plaintiff, issue the process of subpoena thereon, as of course, requiring the defendant to appear and answer the exigencies of the bill;⁸ and he may, in like manner, issue writs of assistance, execution, attachment, or sequestration, for the purpose of compelling obedience to any interlocutory or final order or decree of the court;⁹ he may issue commissions to take testimony;¹⁰ and he may issue subpoenas for witnesses within his district to appear and testify before any commissioner, master or examiner.¹¹

§ 27. Orders by the judges at chambers and at rules.—In order to give flexibility to the system of interlocutory procedure for the speeding of causes to a final hearing, and to meet every exigency, and relieve equity procedure in the circuit courts of the United States from the intolerable delays which were so long the reproach of the system of procedure in the High Court of Chancery in England, it is provided by both rule and statute that: Any judge of the circuit court, as well in vacation as in term time, may at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit courts could make and direct the

¹ Equity Rule 60.

² Equity Rule 66; *Robinson v. Satterlee*, 3 Sawy. 134, Fed. Cas. No. 11,967.

³ Equity Rule 38.

⁴ Equity Rules 33, 38.

⁵ Equity Rule 63.

⁶ Equity Rule 52.

⁷ Equity Rule 5.

⁸ Equity Rules 7, 11, 12.

⁹ Equity Rules 7, 8, 9, 92.

¹⁰ Equity Rule 67.

¹¹ Equity Rule 78.

same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.¹ It would seem that, under the authority of this rule and statute, keeping constantly in view the policy and intentment of the interlocutory procedure, a judge of the circuit court has the power in vacation at chambers, and at rules in the clerk's office, to make and direct any interlocutory order, rule or other proceeding, preparatory to the hearing of any equity cause upon its merits; all that is required to authorize the order or proceeding is that it be preparatory to the hearing of the cause upon its merits, and reasonably adapted to that end, and not in violation of the spirit and policy of the rules. A judge may at chambers, or on a rule-day at the clerk's office, make an order referring any bill, answer or other pleading to a master for impertinence or scandal;² an order allowing plaintiff to amend his bill, after answer, plea or demurrer filed thereto, and either before or after replication filed;³ an order sustaining or overruling a plea or demurrer, and allowing the parties to amend, or further time to plead;⁴ an order allowing defendant further time to plead, answer or demur to the original bill,⁵ or further time to file a supplemental answer, after plaintiff has filed an amendment to his bill;⁶ an order upon a suggestion made by the defendant in his answer that plaintiff's bill is defective for want of parties, and set down for argument upon that objection only, within fourteen days after answer filed;⁷ an order allowing defendant to amend his answer after replication filed, or after the cause has been set down for hearing upon bill and answer;⁸ an order appointing guardians *ad litem* to defend suits for infants or other persons incapable of defending for themselves.⁹ A judge of the court may on any rule-day grant leave to file a supplemental bill, or a bill in the nature of a supplemental bill;¹⁰ and may, on any rule-day, hear argument upon exceptions filed to an answer for insufficiency, and

¹ U. S. R. S., sec. 638; Equity Rule 3.

² Equity Rules 26, 27.

³ Equity Rules 29, 45.

⁴ Equity Rules 33, 34, 35, 38.

⁵ Equity Rule 18.

⁶ Equity Rule 46.

⁷ Equity Rule 52.

⁸ Equity Rule 60.

⁹ Equity Rule 87.

¹⁰ Equity Rule 57.

make an order overruling or sustaining the same.¹ Inasmuch as the taking and stating of an account by a master is a proceeding preparatory to the hearing of the cause upon its merits, and the supreme court has held that references to masters should be upon interlocutory order, and has with emphasis expressed its disapproval of the practice of referring causes to a master upon final decree, it would seem that a judge is authorized to make an order at chambers or on a rule-day, referring a cause to a master to take and state an account, or for other purposes within the scope of the duties of a master.² The judges of the circuit court have power at chambers to issue writs of *ne exeat republica*, but suits in equity must be first commenced and satisfactory proof made that defendant designs quickly to depart from the United States;³ and they may at chambers grant writs of injunction, and pending application for the writ may make a temporary restraining order with or without security.⁴

§ 28. **The order book.**—In the interlocutory procedure, which has been prescribed by the rules, preparatory to the hearing of causes upon their merits, nothing is of greater importance, nor more worthy of attention, than the order book; it is a wise, judicious and useful contrivance; it performs the double functions of a record of all motions, rules, orders and other proceedings made and directed in the clerk's office in vacation, or on rule-days, or at chambers, and that of the means of notice to the parties and their solicitors of the proceedings entered therein; it is a record and a notice. The rules direct that all motions, rules, orders and other proceedings made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. Every step taken in a cause should, at the time it is had and done, be entered in the order book,

¹ Equity Rule 63; *La Vega v. Lapsley*, 1 Woods, 428, Fed. Cas. No. 8,123. Ch. 1.

² *Forgay v. Conrad*, 6 How. 201.

⁴ Equity Rule 55; U. S. R. S., secs.

³ U. S. R. S., sec. 717; Equity Rule 717, 718, 719.

under the appropriate style of the case, from the filing of the bill to the setting of the cause down for final hearing.¹

§ 29. Same—Notice.—Except in cases where personal or other notice is specially required or directed, entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in the order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitor shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion. All motions for rules or orders or other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion. A party is not charged with notice of the filing of pleas, demurrers and other proceedings unless the same are entered in the order book.²

§ 30. Policy and method of the interlocutory procedure.—The policy and purpose of the interlocutory procedure, authorized by the equity rules to be had before the clerk in vacation and on rule-days, and before the judge at chambers, are to advance causes to a speedy hearing on their merits. This policy is expressly declared by the rules and the statutory provision; it is for this purpose that the circuit courts of equity shall be deemed always open; and this intendment should be kept steadily in view in the interpretation and application of the

¹Equity Rules 2, 4.

²Equity Rules 4, 6; *Newby v. Ore-*

gon Cent. Ry. Co., 1 Sawy. 63, Fed. Cas. No. 10,145.

rules.¹ As to the method, it is the intention that a cause shall be advanced at least one step on every rule-day, and that special applications shall be made to the judge at chambers as often as the exigencies of causes may require, to dispose of all dilatory matters, aid the parties in perfecting the pleadings, and remove all obstructions out of the way of the speedy and orderly progress of the suit to a final hearing on its merits. In consonance with this policy and method, upon the filing of the bill the writ of subpoena is issued and made returnable, not to a term of the court, but returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof;² and the appearance day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with process twenty days before that day; otherwise his appearance shall be the next rule-day succeeding the rule-day when the process is returnable; and the defendant shall on the appearance day, either personally or by his solicitor, enter his appearance, which shall be entered on the day thereof by the clerk in the order book.³

§ 31. Same — When pleadings are to be filed.—It is the duty of defendant, unless otherwise specially ordered by a judge of the court, to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance;⁴ and if defendant does not file a demurrer nor a plea, but files an answer which the plaintiff deems sufficient and free from impertinence and scandal, it is the duty of plaintiff to file the general replication to the answer on or before the next rule-day, and put the cause at issue, and make it ready for the proofs;⁵ and three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall enlarge the time.⁶ Where there is filed no demurrer nor plea, but defendant files a sufficient answer, and the plaintiff files his replication, on the rule-days required by the rules, the cause

¹ U. S. R. S., sec. 638; Equity Rules 1, 2, 3, 4, 5, 6.

² Equity Rule 11.

³ Equity Rule 17.

⁴ Equity Rule 18.

⁵ Equity Rule 66.

⁶ Equity Rule 69.

is at issue in two months after the defendant enters his appearance; and, with the three months allowed to take testimony, only five months are required to prepare the cause for hearing on its merits. If defendant files a plea, it is the duty of plaintiff to reply to it, or set it down for argument upon its legal sufficiency not later than the rule-day next succeeding that upon which it is filed.¹ If plaintiff, deeming the plea a good and sufficient bar to the bill, files the general replication thereto, the cause is put at issue and prepared for hearing upon its merits with the same speed and expedition as in the case of an answer.² If defendant files a demurrer, the plaintiff should set it down for argument by the next succeeding rule-day.³ When a demurrer has been interposed and set down for argument, or a plea has been set down for argument upon its legal sufficiency, the argument may be had before any judge of the court at chambers or on a rule-day, and the demurrer or plea disposed of, and leave and directions given as to further pleadings in the cause. If the plea or demurrer be overruled, defendant will be assigned to answer the bill at the next succeeding rule-day, or at such other period as, consistently with justice and the rights of defendant, the same can, in the judgment of the court, be reasonably done. If the plea or demurrer be allowed, the plaintiff may be allowed to amend his bill; and a judge of the court having, upon such special applications, determined the legal questions raised, the cause is allowed to proceed at rules as before, until at issue.⁴

§ 32. Same — When exceptions to pleadings for scandal and impertinence are to be filed.— If, upon entering his appearance and reading the bill, the defendant should be advised that it contains scandalous and impertinent matter, and he desires to have such matter expunged, he must take the necessary steps to have it done before he either pleads, demurs to or answers the bill; and, instead of filing his defense to the bill on the rule-day next succeeding his appearance, he should, on that day, take and file written exceptions to the bill for scandal or impertinence, or both, as the case may be, describing the par-

¹ Equity Rules 33, 38.

² Equity Rule 33.

³ Equity Rules 33, 38.

⁴ U. S. R. S., sec. 638; Equity Rules 1, 3, 6, 33, 34, 35, 36, 37, 38.

ticular passages which he considers scandalous or impertinent; and he should, as early as convenient, procure an order from a judge of the court, referring the bill to a master, for scandal or impertinence, or both, and procure the master to examine and report on the exceptions on or before the next succeeding rule-day, unless the master shall certify that further time is necessary for him to complete the examination; and unless this is done, the defendant waives his right to except to the bill for scandal and impertinence.¹ Either party may, within one month after the master's report is returned to the clerk's office, file exceptions thereto; and if no exceptions are filed to the report within that period, the report shall stand confirmed on the next rule-day after the month has expired. If exceptions are filed to the master's report, they shall stand for hearing before the court.² Defendant has a right to have all scandalous and impertinent matter expunged from the bill before filing his plea, demurrer or answer thereto; and therefore, pending exceptions for scandal and impertinence, his duty to make defense to the suit is suspended; but when the exceptions are finally disposed of the cause proceeds under the rules.³ When an answer is filed by defendant which contains matter deemed by the plaintiff scandalous or impertinent, and he desires to have that matter expunged, he should, instead of filing a replication at the next rule-day, file exceptions for scandal or impertinence, or both, which exceptions must take the same course as that pursued in case of exceptions to bills for scandal and impertinence; and unless the plaintiff files his exceptions to the answer for scandal and impertinence on the rule-day next succeeding the filing of the answer, he waives his right to except to the answer for such cause. Pending the exceptions to the answer, the further progress of the suit is suspended; but after the exceptions are disposed of, the cause proceeds under the rules.⁴

§ 33. Same — When exceptions to answers for insufficiency are to be filed.— If the plaintiff shall be advised that the answer filed by defendant to his bill is insufficient, and he desires to obtain a fuller answer from the defendant, he must, on the next succeeding rule-day, file in the clerk's office written excep-

¹ Equity Rule 27.

² Equity Rule 83; 1 Daniell, 458.

³ Equity Rule 27; 1 Daniell, 459.

⁴ Equity Rule 27.

tions thereto for insufficiency; and if defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set his exceptions down for hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose.¹ If the exceptions are allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; and if the exceptions be overruled, the plaintiff shall file the general replication to the defendant's answer on or before the next succeeding rule-day.² ♦

§ 34. Default of parties in interlocutory procedure.— The parties to suits in equity, by taking advantage of the failure of their adversaries to observe the rules, have the power to compel them to observe the interlocutory procedure to speed the cause to a hearing on the merits. If the defendant fail to answer the original bill or any amended bill, or fail to file a further answer upon the sustaining of exceptions for insufficiency, the plaintiff may take a decree *pro confesso* against him as of course.³ If the plaintiff shall fail to file the general replication to the answer of defendant not excepted to, or adjudged sufficient,⁴ or shall not reply to any plea, or set down any plea or demurrer for argument,⁵ by the time required by the rules, his bill shall be dismissed as of course, unless the court or a judge thereof shall allow further time. And when a bill or answer has been referred to a master for scandal or impertinence, the order of reference shall be considered as abandoned, unless the party obtaining it shall, without any unnecessary delay, secure the master to examine and report thereon on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.⁶ And when exceptions are filed to an answer for insufficiency, and are not submitted to by the defendant, and the plaintiff fails to set them down for hearing before a judge of the court on the second rule-day after they

¹ Equity Rules 61, 63, 64.

² Equity Rule 66.

³ Equity Rules 18, 46, 64.

⁴ Equity Rule 66.

⁵ Equity Rule 38.

⁶ Equity Rule 27.

are filed, the exceptions shall be deemed abandoned and the answer deemed sufficient.¹

§ 35. Interlocutory procedure upon removal.—By virtue of the procedure act, in the courts of the United States the union of equitable and legal causes of action and grounds of defense is forbidden, and upon the removal of a cause from a state court into the United States circuit court the parties have a right to insist that the provisions of this act, however variant from the procedure of the state court, shall be followed. If an action at law be removed from the state court into the United States circuit court, it should be placed on the law docket and proceeded with accordingly; if a cause of equitable cognizance be removed, it must proceed as an equity cause, and if it should, by inadvertence or from any cause, be placed upon the law docket, it should, upon motion of counsel, be transferred to the equity docket, and be proceeded with under the equity rules and procedure in like manner as if the suit had been originally commenced in the circuit court. If the pleadings, as constructed in the state court and under the authority of state procedure, unite legal and equitable causes of action or grounds of defense, upon removal there should be an order for a repleader, and the suit should be recast into two suits, one at law and one in equity, and proceeded with according to law and equity procedure, respectively.²

§ 36. Purposes of the first, second and third chapters.—The preceding sections are merely introductory to the real purpose of this work, which is to trace out and succinctly state the various and successive steps of a suit in equity, from its commencement to its conclusion. The aim and method is to present in chapters 1, 2 and 3 the general basis of administration of equitable remedies in circuit courts of the United States, together with a statement of the general features of the interlocutory procedure requisite in suits in equity, and

¹ Equity Rule 63.

American Ass'n, Limited, v. Eastern

² 1 U. S. Stat. at L., ch. 36, sec. 2, Kentucky Land Co., 68 Fed. R. 721; p. 276; U. S. R. S., sec. 913; Hurt v. Perkins v. Hendrix, 23 Fed. R. 418. Hollingsworth, 100 U. S. 100, 104;

then in the following chapters to present, successively and in detail, the various steps which are required in the prosecution or defense of a suit in equity, from the preparation and filing of the bill to the final decree and its execution, including proceedings in the master's office. It is hoped that the general view presented in this and chapters 1 and 2 will aid in the development of the more minute details to be hereafter presented; to pass from the general to the particular would seem to be a natural method in the development of the science of equity procedure.

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CHAPTER IV.

PARTIES.

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| <p>§ 37. Parties the first consideration.</p> <p>38. Difficulties in stating a rule for all cases.</p> <p>39. General rule as to parties.</p> <p>40. Both the legal and equitable titles should be before the court.</p> <p>41. Inconsistent titles not to be joined.</p> <p>42. Principles upon which courts of equity act in deciding upon parties.</p> <p>43. Classification of parties by the United States supreme court.</p> <p>44. Persons out of the jurisdiction of the court.</p> <p>45. Same—Pleading.</p> <p>46. Parties out of the jurisdiction in ancillary suits.</p> <p>47. Absent parties to suits <i>in rem</i>.</p> <p>48. Same—Procedure to bring in absent parties.</p> <p>49. Trustees and beneficiaries.</p> <p>50. Same—Executors and administrators.</p> <p>51. Parties to suits for the administration of assets.</p> | <p>§ 52. Foreign executors and administrators.</p> <p>53. Suit to execute trusts of a will.</p> <p>54. Suits by testamentary trustees.</p> <p>55. Parties to railroad foreclosure suits.</p> <p>56. Suits in equity by stockholders.</p> <p>57. Suits against corporations—Who to defend—Intervening stockholders.</p> <p>58. Same—Officers made defendants for discovery.</p> <p>59. Parties to ordinary foreclosure suits.</p> <p>60. Parties to bills to redeem.</p> <p>61. Class suits—Numerous parties.</p> <p>62. Parties where real property is subject to successive estates.</p> <p>63. Nominal parties.</p> <p>64. Parties jointly and severally liable.</p> <p>65. Objection for want of parties, when and how raised.</p> <p>66. Same—Objection at the hearing.</p> <p>67. Parties under disabilities—Infants, idiots, lunatics and married women.</p> |
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§ 37. **Parties the first consideration.**—In the examination preparatory to the commencement of a suit in equity, a question of first and paramount importance is, who shall be made parties plaintiff and defendant to the bill? This is very frequently the most difficult and delicate duty that counsel are required to meet; a mistake in this regard may render the suit fatally defective, and result in a sacrifice of the rights of litigants, after long and expensive litigation. The question of parties is one of very special importance in suits in equity in the circuit courts of the United States; this is a result of the peculiar limitations placed by the constitution upon the judicial

power of the government, and may be illustrated by the following considerations, viz.: (1) It is often the case that persons who are indispensable parties defendant to a suit in equity, though resident in the United States, are not inhabitants of or are not found in the district where the suit is brought, and for that reason cannot be sued therein, and on account of their absence the court is not able to proceed to a decree as between the parties before the court, and the jurisdiction fails;¹ and (2) it is often the case that the only ground of jurisdiction in the circuit court of the United States is the fact of diverse citizenship, which must affirmatively appear upon the face of the record, and yet a person who is an indispensable party defendant is a citizen of the same state with the plaintiff, and to join him as a defendant would defeat the jurisdiction of the court, and yet without him the court could not proceed to a decree as between the competent parties before the court.² The case last cited³ was a great suit in equity in the circuit court of the United States for the eastern district of the state of Louisiana; the suit was litigated in the circuit court for thirteen years, and then upon appeal the bill was dismissed by the supreme court of the United States, without any adjudication whatever upon the rights of the litigants, on account of a defect of parties, and a defect which could not be cured, because certain persons who were indispensable parties defendant were citizens of the state of Louisiana, the plaintiffs also being citizens of that state, and diverse citizenship being the jurisdictional fact relied upon to give the circuit court cognizance of the cause. In that case the supreme court reviewed its former decisions upon the subject of parties in equity, and formulated and announced certain rules in regard thereto, which have been steadily adhered to ever since, and have been frequently restated, always without material variation, and are the settled law in all the courts of the United States. These rules will receive more definite attention in a subsequent section.

§ 38. Difficulties in stating a rule for all cases.—No branch of judicial learning has been more prolific of erudite and subtle discussion than the subject of parties to suits in

¹ Mallow v. Hinde, 12 Wheat. 198.

³ Shields v. Barrow, 17 How. 137.

² Shields v. Barrow, 17 How. 137.

equity. The great difficulty has been encountered in the effort to formulate and state a general rule which shall be a safe criterion in all cases. It would seem from the authorities that it has been found practically impossible to formulate any such rule. Some have stated the rule to be, that all persons who are interested in the subject-matter of the suit should be made parties, either as plaintiffs or defendants; others that all persons who are interested in the object of the suit should be made parties; while others have stated the rule to be, that all persons who are interested in the controversy, or whose rights will be affected by the decree or relief sought to be obtained by the bill, should be made parties. None of these has been found, upon strict analysis and practical application, to furnish a safe criterion and an inflexible rule in all cases.¹ It is not the purpose of the author to enter into a discussion of these refinements and subtle distinctions; but he will endeavor simply to state some of the general practical results reached by the text-writers, and the adjudications of the supreme court of the United States, and the equity rules promulgated by that court, in regard to parties to suits in equity.

§ 39. General rule as to parties.—Although no inflexible rule for all cases has been formulated, yet the authorities have stated a general rule which, notwithstanding its many exceptions and limitations, is of incalculable practical value in the preparation of bills and the administration of equitable remedies. Lord Hardwicke has stated the rule thus: "That all persons ought to be made parties before the court who are necessary to make the determination complete and to quiet the question."² Lord Redesdale, who is called the "father of equity pleading," has stated the rule as follows: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous

¹ Story, Eq. Pl. (10th ed.), secs. 76a, 76b, 76c and note 2.

² Story, Eq. Pl. (10th ed.), sec. 76a, citing *Poor v. Clark*, 2 Atk. 515.

they may be, so that the court may be able to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented. This general rule, however, admits of many qualifications.”¹ Mr. Daniell states the rule as follows: “It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject ought generally to be parties to the suit, either as plaintiffs or defendants, however numerous they may be.” . . . “It is required in all cases where a party comes to a court of equity to seek for that relief which the principles there acted upon entitle him to receive, that he should bring before the court all such parties as are necessary to enable it to do complete justice and to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, so as to prevent his being sued or molested again respecting the same matter, either at law or in equity. For this purpose he must take care to have before the court, either as co-plaintiff with himself, or as defendants, all such persons who are so circumstanced that, unless their rights be bound by the decree of the court, they might cause future molestation or inconvenience to the party against whom the relief is sought.”² After adopting as his own the language of Lord Redesdale as to the “constant aim of courts of equity to do complete justice,” Mr. Justice Story says: “Hence, the common expression that courts of equity delight to do justice, and not by halves. And hence, also, it is a general rule in equity (subject to certain exceptions, which will hereafter be noticed), that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to

¹ Mitford (6th Am. ed.), 189, 190.

² 1 Daniell, 284, 285.

prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.”¹ In a suit in equity decided on appeal at the October term, 1889, the above statement of the general rule by Mr. Justice Story was quoted and approved by the supreme court of the United States.²

§ 40. Both the legal and equitable titles should be before the court.—The general rule requiring all persons materially interested to be made parties embraces both legal and equitable interests and titles; both the legal and equitable title should be before the court, and be disposed of and bound by the decree, so as to prevent future suits in regard to the same matter, either at law or in equity. Where a court of equity once obtains jurisdiction of a cause, it has the same power over the legal titles and rights involved that it has over equitable titles and rights. “All persons materially interested, either legally or beneficially,” should be made parties. The reason for the rule requiring both legal and equitable claimants to be made parties is thus stated: “It is in most cases considered necessary, where a plaintiff has only an equitable right in the thing demanded, that the person having the legal right to demand it should be a party to the suit; for, if he were not, his legal right would not be bound by the decree, and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by instituting proceedings to assert his right in an action at law, to which the decree in equity, being *rem inter alias actam*, would be no answer, and the defendant would be obliged to resort to another proceeding in a court of equity to restrain the plaintiff at law from proceeding to enforce a demand which had been already satisfied under the decree in equity.” And “the principle that persons having co-existent rights with the plaintiff to sue the

¹ Story, Eq. Pl. (10th ed.), sec. 72.

² Gregory v. Stetson, 133 U. S. 586.

defendant must be brought before the court in all cases where the subject-matter of the right is to be litigated in equity is not confined to cases where such co-existent rights to sue are at law; it applies equally to cases where another person has a right to sue for the same matter in equity; in such cases the defendant is equally entitled to insist that the person possessing such a right should be brought before the court before any decree is pronounced, in order that such right may be bound by the decree." The rules apply whether the legal or equitable right to sue extends to the whole or only a portion of the subject of the suit.¹

§ 41. Inconsistent titles not to be joined.—The rule requiring all persons interested to be parties does not require the plaintiff to join with himself as co-plaintiff a person claiming the subject of the suit under a title distinct from and inconsistent with his own title. Two persons claiming the same estate through distinct and inconsistent titles cannot be joined as plaintiffs in the same suit; nor is the plaintiff required to make such person a defendant if he claim under a title distinct from and inconsistent with the title of the defendant principally sued, and against whom the plaintiff seeks relief. Distinct, independent and disconnected matters should not be joined in the same suit in equity. The general rule requiring all persons interested to be made parties is, by Chancellor Kent, restricted to cases of parties to the interest involved in the issue, and necessarily to be affected by the decree.²

§ 42. Principles upon which courts act in deciding upon parties.—In determining the question of parties, it would seem that courts of equity are guided by three leading principles, viz.:

(1) A court of equity cannot make a decree which materially and directly affects the rights of a person, without that person being either actually or constructively before the court, and having, according to the established forms of procedure, a full opportunity to vindicate his right, and invoke the powers of

¹1 Daniell, 284, 285, 286, 299, 300; Town of St. Anne, 116 U. S. 386; Story, Eq. Pl. (10th ed.), sec. 72; Gregory v. Stetson, 133 U. S. 579, 587. Wendell v. Van Rensselaer, 1 Johns. Ch. 349.

²1 Daniell, 319-328; Stebbins v.

the court for its protection and preservation; and the court can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without materially and directly affecting the rights of the absent person. This is an inflexible principle, and is not confined in its operation to courts of equity; no court can adjudicate directly upon a person's right without the person being actually or constructively before the court; the principle is founded in natural justice, and is secured by constitutional guaranty; it is due process of law.¹

(2) Another principle acted upon is, that "it is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the decree of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation."²

(3) A third principle acted upon is founded in the solicitude of the court of equity to protect the defendant in suits from "being sued or molested again respecting the same matter either at law or in equity;" this principle is clearly distinguishable from the one last above mentioned, which seeks to prevent future litigation generally. Aside from the general policy of preventing litigation, courts of equity are careful to frame their decrees for the special protection of the defendant before the court against further molestation respecting the same matter decreed upon; and for the accomplishment of this purpose, the plaintiff is required to bring before the court "all such persons who are so circumstanced that, unless their rights be bound by the decree of the court, they might cause future molestation or inconvenience" to the defendant against whom the relief is sought.³ While the second and third principles here stated are not inflexible, yet they are acted upon in determining who shall be parties to a suit, unless justice can be more efficiently promoted by departing from them.

¹ *Mallow v. Hinde*, 12 Wheat. 193; *Shields v. Barrow*, 17 How. 130; *Ribon v. Railroad Cos.*, 16 Wall. 446; *Coiron*

v. Millandon, 19 How. 113; *Gregory v. Stetson*, 133 U. S. 579.

² *Mitford* (6th Am. ed.), 189, 190.

³ 1 *Daniell*, 284, 285.

§ 43. **Classification of parties by the United States supreme court.**—One of the principal limitations upon the judicial power of the government is effected through the character of the parties litigating in its courts; and, as a necessary result, those courts have been required to give a great deal of attention to the subject of parties. The decisions of the supreme court, from the very earliest period of the court's existence, show anxious care upon the subject. Those decisions are marked with great clearness and precision, and in them is developed a classification of parties, and a definition of the different classes, by which a difficult question has been rendered comparatively simple. The supreme court has classified parties as formal parties, necessary parties, and indispensable parties. This classification is not the result of one opinion, but was carefully developed by a line of decisions. In 1854 the supreme court, speaking through Mr. Justice Curtis, formulated and announced, as a result of its former decisions, its classification of parties, as follows: "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other parties not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."¹ In 1867 the supreme court, speaking through Mr. Justice Miller, again stated its classification of parties, thus: "The learning on the subject of parties to suits in chancery is copious, and, within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in con-

¹ *Shields v. Barrow*, 17 How. 130, 139.

troversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interests and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when the parties cannot be subjected to the jurisdiction.”¹ In 1892 Judge Caldwell of the eighth circuit made the following statement of the classification of parties: “The supreme court of the United States divides parties to suits in equity into three classes: First, formal parties; second, necessary parties; third, indispensable parties. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation. They may be parties or not, at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is, that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. . . . Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such

¹Barney v. Baltimore, 6 Wall. 280, 291.

a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”¹

§ 44. Persons out of the jurisdiction of the court.—The first section of the act of congress of February 28, 1839, provides that: “When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.”² And an equity rule promulgated in 1842 provides that: “In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.”³ This statute and equity rule do not introduce any new rule, but are simply an affirmance of a rule previously established by the decisions of the supreme court of the United States.⁴ It remains true, notwithstanding the act of congress and the equity rule, that a circuit court can make no decree affecting the rights of an

¹Chadbourn's Ex'rs v. Coe, 10 C. C.

A. 78, 86, citing Shields v. Barrow, 17 How. 130, 139; Ribon v. Railroad Cos., 16 Wall. 446, 450; Coiron v. Mil-
laudon, 19 How. 113; Williams v. Bankhead, 19 Wall. 563; Kendig v. Dean, 97 U. S. 423; Alexander v. Horner, 1 McCrary, 634.

²U. S. R. S., sec. 737.

³Equity Rule 47.

⁴Shields v. Barrow, 17 How. 130, 139; Cameron v. McRoberts, 3 Wheat. 591; Osborn v. Bank of United States, 9 Wheat. 738; Harding v. Handy, 11 Wheat. 132.

absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without materially and directly affecting those rights.¹ Judge Caldwell, discussing the relaxation of the rule in relation to persons out of the jurisdiction of the court, has said: "The relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of the courts by the citizenship of the parties; and second, by their inability to bring in parties out of their jurisdiction by publication. The extent of the relaxation of the general rule in the federal courts is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the supreme court on the subject of the rule. The supreme court has said repeatedly, that, notwithstanding this rule, a circuit court can make no decree affecting the rights of an absent person, and that all persons whose interests will be directly affected by the decree are indispensable parties."²

§ 45. Same — Pleading.— It is provided by an equity rule that: "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction."³ This rule is declaratory of the practice of the High Court of Chancery of England; and the averments of the bill set up as an excuse for not making absent persons parties should, if not admitted, be proved.⁴

§ 46. Parties out of the jurisdiction in ancillary suits.— In ancillary suits, such as cross-bills and bills in equity filed in

¹ *Shields v. Barrow*, 17 How. 130, 139; *Ribon v. Railroad Cos.*, 16 Wall. 446, 450; *Coiron v. Millaudon*, 19 How. 113.

² *Chadbourne's Ex'rs v. Coe*, 10 C. C. A. 83, 84.

³ Equity Rule 22.

⁴ *Mitford* (6th Am. ed.), 190, 191; 1 *Daniell*, 260, 261.

the circuit court to restrain suits and judgments at law therein, it is no objection that the defendants to the bill are out of the jurisdiction of the court. Such suits are not original, but are ancillary or supplementary to the original litigation; and substituted service of the subpoena may be made upon the attorney of record of plaintiff in the original suit, or on the party outside of the district, being defendant in the auxiliary bill; but an order of court is necessary to authorize substituted service. In such cases the jurisdiction of the court does not depend upon the citizenship of the parties; it depends upon the cognizance of the original suit.¹ Of this class of suits Mr. Justice Story, on the circuit, said: "I believe the general, if not the universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required."² And Justice Blatchford, on the circuit, has made this statement as to the character of ancillary suits: "It is a well settled principle that a bill filed on the equity side of a court to restrain or regulate a judgment or suit at law in the same court is not an original, but an ancillary and dependent bill, and supplementary merely to the original suit; and that such bill can be maintained in a federal court without reference to the citizenship of the parties. On this principle, the suit in equity not being an original suit, the process or notice issued on its being brought, to advise plaintiff in the suit at law that it has been brought, is not regarded as original process or as an original proceeding. Such plaintiff is in court, voluntarily, for the purpose of prosecuting his suit at law and obtaining a judgment, and thereby makes himself subject to any control the court may find it equitable to exercise over his

¹ Jones v. Anderson, 10 Wall. 327; v. Stetson, 4 Mason, 349, Fed. Cas. No. Freeman v. Howe, 24 How. 450; 4,164; Clark v. Matthewson, 12 Pet. 164.
Logan v. Patrick, 5 Cranch, 288; Dunn v. Clark, 8 Pet. 104; The Cortes Co. v. Tannhauser, 9 Fed. R. 226; Dunlap

² Dunlap v. Stetson, *supra*.

suit at law and over the matters involved in it, to the extent of perpetually staying its prosecution, if, on equitable considerations, that ought to be done. All that is requisite is that the plaintiff in the suit at law should have notice from the court of the institution of the proceeding in equity. If he will not defend against it after receiving such notice, he will have to submit to a stay of his suit at law, if, after an *ex parte* hearing, the court shall deem such stay proper. He is in court for the purposes of the action of the court on the subject-matter of the proceeding in equity, by having become the plaintiff in the suit at law. He is represented, for the purpose of giving notice to him of the institution of such proceedings, by his chosen attorney in the suit at law. This is a necessity. His residence may be unknown, or, if known, remote. His attorney is presumed to know how and where to communicate with him. Therefore, it is proper to give such notice to the attorney, and it is the duty of the attorney to bring such notice to the attention of his client. . . . A subpoena or notice issued on the filing of such a bill as those in the present suits" (bills to restrain the prosecution of suits at law) "has never been regarded in the courts of the United States as an original process or proceeding, and has been allowed to be served on the attorney for the plaintiff in the suit at law, and even to be served on such plaintiff out of the district."¹ The practice of substituted service in bills to restrain actions at law was sanctioned by the High Court of Chancery of England when the plaintiff in the action at law was out of the jurisdiction of the court.²

§ 47. Absent parties to suits in rem.—It is provided by act of congress that: "When in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district where the suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall

¹ The Cortes Co. v. Tannhauser, *supra*.

² 1 Daniell, 263.

be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or when such personal service is not practicable, such order shall be published, in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within such further time, to be allowed by the court in its discretion; and upon proof of the service or publication of such order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant or defendants without appearance, affect only the property which shall have been subject to the suit and under the jurisdiction of the court therein within such district. And when a part of said property shall be within another district of the same state, the suit may be brought within either district. Provided, however, that a defendant or defendants not actually personally notified may, upon entering his appearance within one year from judgment, obtain an order setting aside the judgment, and permitting him to defend, on payment of costs."¹

§ 48. Same — Procedure to bring in absent parties.— State statutes prescribing the method of service upon absent defendants by publication or otherwise are not applicable to nor binding upon the federal courts, and constitute no part of the equity procedure in such courts. The method of procedure provided by the act of congress for acquiring jurisdiction over absent defendants by publication is exclusive of all other modes, and to render such service effective the requirements and provisions of the federal statute must be strictly pursued; and when the requirements of the statute are not strictly complied with, the court acquires no jurisdiction over the absent defendants not appearing, and any decree rendered by the court in the suit is, as to the absent defendants not appearing, abso-

¹ 18 U. S. Stat. at L., ch. 137, sec. 8, p. 470.

lutely void, although publication may have been made in the manner required by the statutes and authorized procedure of the state in which such federal court is held.¹ There are but few decisions construing the act of congress under consideration, as to the proper procedure to bring in absent defendants, and they are not uniform. There are two leading cases upon the point, one by Circuit Judge Dillon, and the other by District Judge Gresham, and they are in some respects quite variant from each other. It would seem proper that the citizenship and residence of the absent defendant should be averred in the bill, if they can be ascertained; and if such citizenship and residence cannot be ascertained, this fact should be averred. But it is recognized as proper practice to show these facts by separate affidavit filed with the papers in the cause. Judge Dillon held that the bill should be filed and subpoena regularly issued for the absent defendants, and returned not found, and that no further proceedings should be taken until the next term of the court, in order to give the absent defendants an opportunity to voluntarily appear; and that if they do not then voluntarily appear, the court may, upon proper application and showing, make the order for them to appear, plead, answer or demur by a day certain, designated in the order; he decided that the return of the subpoena not found is a condition precedent to the making of this order. Judge Gresham held that the return of the subpoena not found is not a condition precedent to the making of the order to appear, plead, answer or demur, but that the order might be made at the institution of the suit upon a proper showing by affidavit of the citizenship and residence of the absent parties. There is no diversity of opinion as to the superiority of the personal service of the order over constructive service by publication, if personal service be practicable; service of the order upon the absent defendants may be made by the marshal or his deputy of the district where the absent defendant resides or is found, and the return thereof made in the usual form, or by affidavit; and the day fixed in the order for the appearance of the defendant need not be a rule-day in equity, but may be upon any day, in the discretion

¹ *Bracken v. Union Pac. Ry. Co.*, Fed. R. 712; *Guaranty Trust and Safe* 56 Fed. R. 447, 450; *Batt v. Proctor*, *Deposit Co. v. Green Cove Springs &* 45 Fed. R. 515; *Meyer v. Kuhn*, 65 *Melrose R. Co.*, 139 U. S. 137, 151.

of the court or judge making the order. If personal service of the order cannot be made, then this fact should be made to appear to the court or a judge thereof by proper application and affidavit, and another order obtained for constructive service upon the absent defendants by publication.¹ It would seem from the act of congress and the equity rules giving the judges authority to make interlocutory orders out of term time for the preparing of causes for trial upon their merits, that any order required in the procedure for bringing in absent defendants could be made by a judge of the court either on rule-days or at chambers; such orders are merely for the purpose of speeding the cause.² No personal decree can be rendered by the court against an absent defendant not appearing and submitting himself to the jurisdiction of the court.³

§ 49. **Trustees and beneficiaries.**—In conformity to the principles of equitable remedial justice requiring both the legal and equitable title and right to be brought before the court, in order that it may be settled and bound by the decree, it is a rule of very wide application that, in suits respecting trust property, the trustee, as the repository of the legal title, and the *cestui que trust*, as the owner of the equitable estate and beneficial interest, should both generally be made parties to the suit.⁴ But to this rule there are some exceptions. In a suit by the trustee to secure, preserve and recover the trust property, where the suit is not intended to affect in any manner the relation of the trustee with his *cestui que trust*, nor to administer or disburse the trust fund, it is not necessary to make the beneficiary a party.⁵ Where, by the instrument creating the trust, the trustee is vested with such powers and subjected to such obligations with respect to the execution of the trust that he is thereby made the representative of the beneficiaries in all things relating to the trust, the *cestui que trust* is not a necessary party to a suit against the trustee to enforce or de-

¹ *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928; *Forsyth v. Pierson*, 9 Fed. R. 801.

² U. S. R. S., sec. 638; Equity Rule 3.

³ 18 U. S. Stat. at L., ch. 137, sec. 8, p. 470; *Pennoyer v. Neff*, 95 U. S. 714, 748.

⁴ 1 *Daniell*, 285, 286, 311; *Carey v. Brown*, 92 U. S. 171.

⁵ 1 *Daniell*, 313; *Carey v. Brown*, 92 U. S. 171; *Kerrison v. Stewart*, 93 U. S. 155; *Story v. Livingston*, 13 Pet. 359.

clare the trust void. In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it can be impeached for fraud or collusion between the trustee and the adverse party.¹ Where the object of a bill in equity is to defeat a trust in real estate, and to divest and take away the interest of a minor or a *feme covert* in such real estate, and the trust is an active one, and the trustee is vested with the legal title to the property, and charged with large powers over it and important duties to perform respecting it, he is a necessary party to the suit.² It is the settled doctrine of the supreme court of the United States that the person for whose benefit a trust is created, and who is to be the ultimate receiver of the money, the trust being created in such terms that the money is certainly payable to him, may sustain a suit in equity to have it paid directly to himself.³

§ 50. Same — Executors and administrators.—In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. Upon a bill filed for that purpose by an interested party, alleging that the executor has proved the will and had issued to him letters testamentary, the plaintiff is entitled, as a matter of course, to a decree for an account of the estate constituting the trust property. A single creditor may sue the executor in equity for his demand, and obtain a decree for payment out of the personal estate, without taking a general account of the testator's debts. And this jurisdiction over executors and administrators is vested in the circuit courts of the United States, where diverse citizenship exists, and is not defeated by the probate laws of the states.⁴ An administrator of a deceased debtor and a person to whom the decedent conveyed his real and personal property for the pur-

¹ 1 Daniell, 312, 313; *Carey v. Brown*, 92 U. S. 171; *Kerrison v. Stewart*, 93 U. S. 151; *Vetterlein v. Barnes*, 124 U. S. 169.

² *McArthur v. Scott*, 113 U. S. 340; *O'Hara v. McConnell*, 93 U. S. 150.

³ *Russell v. Clark's Ex'rs*, 7 Cranch, 69.

⁴ *Hogan v. Walker*, 14 How. 32, 36; *Kendall v. Creighton*, 23 How. 90; *Pulliam v. Pulliam*, 10 Fed. R. 26; *Payne v. Hook*, 7 Wall. 425; *Walker v. Beall*, 9 Wall. 743.

pose of defrauding his creditors may be joined as co-defendants in a bill filed in the circuit courts of the United States for the purpose of reaching such property and applying it to the debts of the decedent; and to maintain such bill it is not required that the creditor should have reduced his claim to judgment; the equitable jurisdiction is based upon the existence of a trust, the execution of which may be enforced against the administrator and all who are in fraudulent collusion with him or his intestate;¹ and the sureties of an administrator on his official bond may be joined as co-defendants with the administrator in a bill filed in the circuit court to enforce the trust imposed by law upon the administrator.² The personal representative of a deceased person, and not his heir at law, is the proper party to prosecute a suit in equity to enforce a trust in favor of the decedent in personal property;³ and where executors are by a will appointed trustees for the purpose of executing the trusts thereof, they should be made parties defendant to a suit to set the will aside;⁴ and the personal representative in all cases represents the personal estate of the deceased, and is the proper party to sue for and recover the same, either at law or in equity, which he may do without making other persons interested in the estate parties to the suit.⁵ The executor of a deceased mortgagee is the proper person to sue in equity for the foreclosure of the mortgage, for the reason that the money secured by the mortgage is a part of the personal estate of the mortgagee, and at his death belongs to his personal representative.⁶

§ 51. Parties to suits for the administration of assets.—

When by statute the real estate of deceased persons is made assets for the payment of their debts, it is not necessary to make the heirs or devisees parties to a suit against the executor or administrator for the administration of such assets.⁷

¹ Hogan v. Walker, 14 How. 32, 36; McLaughlin v. Bank of Potomac, 7 How. 220.

² Payne v. Hook, 7 Wall. 425; Kendall v. Creighton, 23 How. 90.

³ Ware v. Galveston City Co., 111 U. S. 170.

⁴ American Bible Society v. Price, 110 U. S. 61.

⁵ 1 Daniell, 313, 314.

⁶ 1 Daniell, 286.

⁷ Telfair et al., Ex'rs, v. Stead's Ex'rs, 2 Cranch, 407, 418; Story's Eq. PL., sec. 163.

§ 52. **Foreign executors and administrators.**—Letters testamentary, or letters of administration, confer no authority outside of the jurisdiction of the sovereignty which grants them. An executor or administrator appointed in one state, and receiving letters testamentary or of administration from its courts, cannot, by virtue of such appointment and letters, maintain an action in another state to enforce an obligation due his testator or intestate, unless there be a statute of the latter state giving effect to the appointment by the former state and authorizing such action.¹ But an executor or administrator appointed in one state may sue in equity in another state before he has letters therefrom, and, having obtained letters, may aver the fact by amendment before answer filed and after demurrer. He has an interest in the subject-matter, although he has no standing in court, and for that reason he may support his suit, in order to defend his right, by authority afterwards acquired. In equity a plaintiff may file his bill as administrator before he has taken out letters of administration, and it will be sufficient to have the letters at the hearing, which is not the case at law. It is a general rule in equity pleading and procedure that facts which have occurred after the filing of the bill must be brought before the court by supplemental bill and not by way of amendment; but, as an exception to that rule, an executor or administrator appointed in one state may sue as such in another state and subsequently take out letters testamentary or of administration in the latter state, and set up that fact by way of amendment.² Where the statutes of a state authorize it, an executor or administrator appointed in another state may maintain a suit in the former state without obtaining letters therein.³ An executor or administrator appointed in a foreign country cannot, by virtue of his appointment, sue in the courts, either state or federal, of this country.⁴ The rule that letters testamentary do not authorize an executor to sue for the personal estate of the testa-

¹ Johnson v. Powers, 139 U. S. 156; Noonan v. Bradley, 9 Wall. 394; Kerr v. Moon, 9 Wheat. 565; Vaughan v. Northup, 15 Pet. 1; Noonan v. Bradley, 12 Wall. 121; Mills v. Knapp, 39 Fed. R. 592, 595; Black v. Allen Co., 42 Fed. R. 618, 625.

² 1 Daniell, 420, 421; Mills v. Knapp, 39 Fed. R. 592, 595; Black v. Allen Co., 42 Fed. R. 618, 625; Buck v. Buck, 11 Paige, 170.

³ Hays v. Pratt, 147 U. S. 557.

⁴ Dixon v. Ramsey, 3 Cranch, 319; Graeme v. Harris, 1 Dall. 221.

tor outside of the jurisdiction of the sovereignty which granted the letters has no application to a suit for land vested by the will in the executor. In passing upon a case of this character Chief Justice Marshall said: "It has been decided in this court that letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which those letters are granted. But this decision has never been understood to extend to a suit for lands devised to an executor. In such case the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title."¹

§ 53. **Suits to execute trusts of a will.**—An equity rule provides that: "In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him."² This equity rule is a literal copy of the thirty-first of the orders of the High Court of Chancery of England of August, 1841, which changed the ancient, long established and invariable rule of that court which required the heir at law to be made a party defendant to all suits in equity in cases of wills relating to real estate. Touching this rule Mr. Daniell says: "The practice with regard to heirs at law, however, arises from the peculiar principle adopted by courts of equity in cases of wills relating to real estate, which they will not carry into effect till the due execution of the will has been either admitted by the heir or proved against him, for which purpose it is required that he should be made an adverse party." And this was the rule whether the suit was brought by the executor or the devisee. It was said that the heir at law should be made a party so that the will might be established against him. The reason and necessity for making the heir at law a party, and proving the will against him, in suits in equity to carry the will into effect, is this: At the time the rule was adopted in the equity courts there was no provision in the English law for the probate of wills of real estate by the probate courts of England, so as to conclude all parties in interest; and it was the settled rule of law of England that a devise of land was in the nature

¹ Lewis v. McFarland, 9 Cranch, 151.

² Equity Rule 50.

of a conveyance and special appointment, passing the title of the testator at the date of publishing of the will; and in any suit claiming under the will it was necessary to establish the validity of the will by proof; and for this reason it was necessary to make the heir at law a party.¹

§ 54. **Suits by testamentary trustees.**—An equity rule provides that: "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter at the hearing, if it shall so think fit, order such persons to be made parties."² This equity rule is a literal copy of the thirtieth of the orders of the High Court of Chancery of England of 1841. The principle embodied in the rule and the order is an exception to the general rule in equity which requires the plaintiff to bring before the court all persons legally or beneficially interested in the suit; but the principle was engrafted upon the rule, in cases of trust deeds at least, long before the promulgation of the English order above referred to, and is thus stated by Mr. Daniell: "Where a bill is filed by trustees for sale, against a purchaser, for a specific performance of the contract, the *cestui que trusts* of the purchase-money must be parties, unless there is a clause in the trust deed declaring the receipt of the trustees to be a sufficient discharge, which is considered as a declaration by the author of the trust that the receipt of the persons beneficially interested in the produce of the sale shall not be necessary. . . . There are instances in which, under peculiar circumstances, trustees are allowed to maintain

¹ 1 Daniell, 324-327; Currell v. Vilers, 72 Fed. R. 330, 336, and authorities cited; Darby's Lessees v. Mayer et al., 10 Wheat. 465; Robertson v. Pickrell, 109 U. S. 608-617; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460; s. c., 22 Am. Dec. 47.

² Equity Rule 49.

a suit without their *cestui que trusts*, as in the case before mentioned, of trustees under a deed, by which estates are vested in them upon trust to sell and to apply the produce amongst creditors or others, with a clause declaring the receipt of the trustees to be a good discharge to the purchasers."¹ The supreme court of the United States declares this principle to be not a new one, but an old one and long in use, and found well adapted, in the class of cases to which it applies, to the protection of the rights of beneficiaries, without subjecting litigants to unnecessary inconvenience.²

§ 55. Parties to railroad foreclosure suits.—In the execution of railroad mortgages to secure the payment of the bonds of the railroad company, it is usual to convey the property to a trustee for the bondholders; and a suit to foreclose such mortgage should be brought by and in the name of the trustee, and the bondholders should not be made parties to the suit. As a rule the trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him in good faith to enforce the trust; and, in the absence of fraud, whatever binds and forecloses the trustee in such legal proceedings binds and forecloses the bondholders, although they are not actual parties to the suit.³ Where the trustees of a railroad mortgage are dead, a bill of foreclosure may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders secured by the same mortgage; or if there be several successive mortgages, the trustees of which are dead, and plaintiffs hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all of the bondholders under each mortgage.⁴ If the bondholders be permitted to become parties in railroad foreclosure suits, it would result in great delay in the cause, and entail unnecessary expense upon litigants; and therefore they are not

¹ Daniell, 311, 312.

² Kerrison v. Stewart, 93 U. S. 155.

³ First National Bank of Cleveland v. Shedd, Fed. Cas. No. 12,174; Vose v. Bronson, 6 Wall. 452; Shaw v. Little Rock & Ft. S. R. Co., 100 U. S. 605; Kerrison v. Stewart, 93 U. S. 155; Richter v. Jerome, 123 U. S. 233; Corcoran v. Canal Co., 94 U. S. 741;

Keenland v. Luce, 141 U. S. 491, 509;

Elwell v. Forsdick, 134 U. S. 500, 510;

Kent v. Iron Co., 144 U. S. 75; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. R. 182, 192.

⁴ Galveston, Houston & Henderson R. Co. v. Cowdrey, 11 Wall. 459, 483.

permitted to become parties except under special circumstances. The evils which would result from a different policy was stated by Judge Caldwell of the circuit court of appeals for the eighth circuit in an address delivered before the Greenleaf Law Club of St. Louis on "Railroad Receiverships in the Federal Courts."¹ Discussing the delays in such suits he said: "The suit is sometimes protracted by the courts admitting to the suit as defendants individual bondholders with leave to file answers and cross-bills. The trustee in the mortgage is the representative of all the bondholders. The case must be very rare indeed where the trustee is not capable of representing all the bondholders, or where any one or more of the bondholders has any special rights or equities to be protected different from those of the other bondholders. In most cases where individual bondholders seek to be made parties, they do so, not for the purpose of asserting or maintaining any right which their trustee would not or could not assert and maintain for them, but for the purpose of gaining some advantage over the majority of their fellow-bondholders represented by the trustee. A single bondholder admitted as a party to the suit may file all manner of pleading and make all manner of captious objections, and has the right to insist upon being heard on every motion and at every step in the case. If fifty different bondholders are admitted, then the fifty have all these rights and also the right to appeal. It is in vain that the great majority of the bondholders agree upon a scheme of reorganization which places every bondholder on an exact equality. From their vantage ground as parties to the suit, the individual bondholders reject any and every scheme of reorganization which does not give them greater rights and privileges than are enjoyed by their fellow-bondholders, and by threats of protracting the litigation, and of resisting a decree of foreclosure, and of appealing from the decree, they compel their fellow-bondholders to give them that to which they are neither legally nor equitably entitled. The sound rule is not to admit individual bondholders to become parties. Even where the trustee is impeached or disqualified, the individual bondholder should not be admitted as a party, but the court should appoint or cause to be appointed or elected, in the mode provided in the trust deed, a

¹ American Law Review, vol. 30, p. 161.

capable and impartial trustee in the place of the trustee impeached or disqualified." It is the duty of the trustee to defend the life of the trust whenever it is assailed, and to act promptly for the preservation of the trust property, and to render effective the security; and if he neglects to act, or is guilty of bad faith, or assumes or is, by the circumstances of the case, forced into a position hostile or prejudicial to the bondholders, the court will direct the election of a new trustee, or will permit a small number of the bondholders to be made parties to act in the suit on behalf of themselves and their fellow-bondholders.¹ Where, however, a railroad company executes a mortgage on its property directly to the bondholders, without the intervention of a trustee, and all the bondholders are named and their several interests are described in the mortgage, all of the bondholders should be made parties to a suit for its foreclosure.²

§ 56. Suits in equity by stockholders.—Corporations are legal or ideal persons, created by law, capable of suing and being sued by their corporate name and in their corporate capacity, and are the proper parties to sue and defend in all controversies affecting their corporate rights and interests. The directors and officers of a corporation, chosen to manage its affairs, are trustees for the corporation and its stockholders who are the beneficiaries of the trust; and it is the duty of such trustees to maintain and defend suits in the name of the corporation for the preservation and vindication of its corporate rights and interests; and in the conduct and management of legal proceedings by the officers and directors, they represent the corporation and its stockholders, who are, in the absence of fraud, bound by the results. But if the officers and directors refuse to act for the preservation of the corporate rights and interests, or are guilty of fraud, the execution of the trust may be compelled in equity by a bill filed for that purpose by the stockholders.³ But the courts of the United States will require a very clear showing before they

¹ *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 66 Fed. R. 169, 179.

² *Nashville & D. R. R. Co. v. Orr*, 18 Wall. 471.

³ *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Forbes v. Whitlock*, 3 Edw. Ch. (N. Y.) 446; *Koehler v. Black River Falls Iron Co.*, 67 U. S. 715; *Dodge v. Woolsey*, 18 How. 331.

will entertain such a bill. An equity rule promulgated January 23, 1882, provides that: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action."¹ The principle embodied in the rule was announced in an opinion in the supreme court in the year 1881, in which the court, speaking by Mr. Justice Miller, said: "We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but

¹ Equity Rule 94.

the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he had made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.”¹

§ 57. Suits against corporations — Who to defend — Intervening stockholders.—All suits intended to reach or affect the property or corporate rights and interests of a corporation should be brought and prosecuted against it in its corporate name; and it is a rule of universal application that a corporation, when sued, must appear and defend in its corporate name and capacity, under the direction and control of its lawfully-constituted managing officers, who are trustees for the stockholders. It is neither the duty nor the right of stockholders to defend suits against corporations of which they are members; and it is only in a clear case of conspiracy or fraud

¹ *Hawes v. Contra Costa Water Co.*, 104 U. S. 450, 462.

upon the part of the officers of a corporation to sacrifice the interests of the stockholders, or a fraudulent failure on the part of the officers to defend a suit brought against a corporation, that a stockholder will be allowed to become a party defendant for the purpose of protecting his own interests.¹

The doctrine upon this subject was, in 1864, stated by the United States supreme court, speaking through Mr. Justice Nelson, as follows: "As these two stockholders, though not made defendants by the bill, were permitted, by leave of the court, to appear and put in answers in the name of the Milwaukee and Minnesota Company, it is material to inquire into the effect to be given to them. That they cannot be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the court entitles the complainants to enter an order that the bill be taken *pro confesso*. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer or stipulation that might be entered into by the parties or their counsel. It is thus apparent that while the name of the corporation is thus used as a real party in the litigation so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents. It is insisted, however, that the directors of the company refused to appear and defend the bill against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and hence the necessity, as well as the propriety and justice, of permitting the defense by a stockholder in their name. Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case the court, in its discretion, will permit a stockholder to become a party defendant for the purpose of

¹ *Bronson v. Railroad Co.*, 2 Wall. 323; *Trust Co. v. Railroad Co.*, 43 283; *Forbes v. Railroad Co.*, 2 Woods, Fed. R. 14.

protecting his own interest against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense. But this defense is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interest and of those who may join him, and against whom any proceeding, order or decree of the court in the cause is binding, and may be enforced. It is true the remedy is an extreme one, and should be admitted by the court with hesitation and caution, but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong.”¹

In an elaborate opinion at chambers at Austin, Texas, in 1872, vacating, as improvidently made, a previous order allowing individual stockholders to intervene for the protection of their interests, after stating the case, Bradley, Circuit Justice, states the doctrine and the principles upon which it rests, thus:

“In order properly to understand the questions thus raised, it will be necessary to examine the general character of suits and proceedings in equity against corporations in their relations to the interest of the stockholders, and the general right of the latter to intervene therein, *pro interesse suo*. A commercial or other business corporation is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are to meet at stockholders’ meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights, except incidental ones, subsidiary or auxiliary to these. Of course a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company’s books, and to inspect these books. For the invasion of

¹ Bronson v. Railroad Co., *supra*.

these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case. But all remedies for injuries to the property or rights of the company must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company, by name, unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions. There is one case, and one only, in which he can interpose, and that is where the officers and managers of the company, by fraud and collusion with third persons, are sacrificing or are about to sacrifice and betray the interests of the corporation. For such breach of trust and conspiracy he can call the guilty parties to an account in a court of equity. . . . It is true that the complainants filed the bill in this case on behalf of themselves and of all others being stockholders, creditors or bondholders of the corporation defendant who might desire or be entitled to intervene. But it was never contemplated, nor is it the proper practice, that the persons embraced in that category should intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. The complainants, by suing as representatives, opened the door to all other parties named to come in and take the benefit of the proceedings and decree, not to oppose and nullify them. In a suit so instituted, parties may come in and prove their claims or status and participate in all the dividends and benefits to be derived from the suit. Rival creditors, by proceedings before a master, may control the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property. To be allowed to intervene as general defendants and contestants is another and a different thing. This can be admitted only upon the ground before referred to, to wit, having an interest in the results as a stockholder or otherwise, and being able to show fraud or collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. A suggestion, in the

progress of the suit, that an officer of the court is disposed to act fraudulently, or that the court has made an injudicious order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit and seek to defend or control the proceedings. An original bill would rather seem to be the proper mode of proceeding. . . . And it is in the discretion of the court whether or not to permit a stockholder to become a party defendant in any case where he is not made such by the bill.”¹

§ 58. Same — Officers made defendants for discovery. — In a suit in equity against a corporation, its directors, officers and members may, at the election of the plaintiff, be joined as defendants for the purpose of obtaining from them a discovery on oath of facts to sustain the case made by the bill; and it is not necessary for the bill to allege that such directors, officers and members are alone cognizant of the facts of which discovery is sought, but it will be sufficient if it appear that the facts averred in the bill are material to the relief sought against the corporation and rest in the knowledge of such directors, officers and members.²

§ 59. Parties to ordinary foreclosure suits. — It is a rule that to a bill filed to foreclose a mortgage the mortgagor and all incumbrancers, both prior and subsequent, whether by mortgage or judgment, and all persons having an interest in the property at the commencement of the suit, should be made parties; and, while the rule is not of universal application, there are three very cogent reasons why it should be enforced when at all practicable, viz.: (1) They are all interested in the account to be taken of the various sums of money to be decreed a charge upon the property, and the fixing of the amounts and priorities of the liens of such sums of money, and the propor-

¹ *Forbes v. Railroad Co.*, *supra*. 363; *Vermilyea v. Bank*, 1 Paige,

² 1 *Daniell*, 186, 187; *Bronson v. Railroad Co.*, 2 Wall. 283; *Brumley v. Manufacturing Co.*, 1 Johns. Ch. 38; *May v. Iron Co.*, 9 Paige, 193; *Story*, Eq. Pl., sec. 235.

tion of the burdens to be borne by the different parts of the property; and (2) in order to prevent a sacrifice of the property at the foreclosure sale, and realize its full value, it is necessary that the purchaser at such sale should acquire a clear, unincumbered and indefeasible title, and such result can be attained in no other way than by a decree which shall foreclose and conclude all persons in interest, and sell and vest the whole title of the property in the purchaser; and (3) the junior incumbrancers are entitled in equity to redeem the prior incumbrancers, and the mortgagor is entitled to redeem them all.¹ In one of the cases the defendants (mortgagors) to a bill of foreclosure stated in their answer that certain legacies were a charge on the property, superior to the plaintiff's mortgage, and that the legatees should be made parties to the suit, and Chancellor Kent, in disposing of the question thus raised, said: "These legatees, whose legacies, as stated in the answer, were a prior incumbrance, ought to be made parties in order to prevent a sale of the premises from being deceptive or embarrassing to the purchaser and injurious to the rights of the defendants, and to enable the plaintiffs, if necessary, to redeem the land from the prior incumbrance. In cases of a strict technical foreclosure there may be no injury in leaving a prior incumbrance undisturbed; but where the land is to be sold, it would seem to be essential to the interests of all concerned, and necessary to prevent a sacrifice of the subject at the sale, that the certainty, value and extent of the prior incumbrance, made known by the pleadings, should be ascertained and declared. It is the general doctrine of this court that all parties having an interest in the subject-matter of the suit should be before the court, to the end that their interest may be embraced by the decree, and that one suit may terminate all controversy depending on the various rights. In this case it is said that the legacies are a charge on the whole land, of which the interest mortgaged is

¹ Grant v. Phoenix Life Ins. Co., 121 U. S. 105; Finley v. Bank of United States, 11 Wheat. 306; Mendenhall v. Hall, 134 U. S. 559, 571; Caldwell v. Taggart, 4 Pet. 202; Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Fed. Cas. No. 13,643; Haines v. Beach, 3 Johns. Ch. 459; Ensworth v. Lambert, 4 Johns. Ch. 605; Cook v. Mancius, 5 Johns. Ch. 93; McGown v. Yerks, 6 Johns. Ch. 450; 1 Daniell, 307, 308, 309; Jerome v. McCarter, 94 U. S. 734; Hagan v. Walker, 14 How. 28-37; McClure v. Adams, 76 Fed. R. 899.

only an undivided part. It may be necessary in that case to apportion the charge and settle the proportion that the interest of the mortgagors ought to bear before a sale can be discreetly ordered, or the purchaser safely and intelligently buy.”¹

The supreme court of the United States, in reversing a final decree upon the foreclosure suit of a junior mortgagee, and remanding it for the purpose of making the prior mortgagees parties to the suit, said: “It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate, and not instigate, litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.”²

It is the usual practice to insert in foreclosure bills an interrogatory to the mortgagor requiring him to answer whether or not there are any other, and if any, what, incumbrancers, and if he answers stating any, the incumbrancers are made parties to the suit.³

§ 60. Parties to bills to redeem.—A bill to redeem a mortgage should be filed by the mortgagor, if he be living and has made no assignment or transfer of his equity of redemption; if the mortgagor be dead, the bill should be filed by his heir at law or devisee, and if he has by his will vested the property in testamentary trustees they are the proper parties to bring the bill; if the mortgagor has fully assigned his equity of redemption, then he is not a proper party, and the bill should be brought by his assignee.⁴ The mortgagee, if living, is the only indispensable party defendant to the bill to redeem; and if he be dead, his heir at law, or his devisee or trustee in whom the legal title to the mortgaged premises is vested, must be a party defendant, so that the title may be bound by the decree of foreclosure, and passed to the purchaser at the foreclosure sale; and the executor or administrator of the mortgagee should also

¹ McGown v. Yerks, *supra*.

² Caldwell v. Taggart, *supra*.

³ Haines v. Beach, *supra*.

⁴ 1 Daniell, 304; Dexter v. Arnold, 1 Sumn. 109, Fed. Cas. No. 3,857; Story's Eq. Pl., secs. 182, 183, 184, 185.

be made a party defendant, because the fund secured by the mortgage is personal assets in the hands of the personal representative for the payment of debts; and if the mortgagee has assigned the mortgage his assignee should be made a party defendant in his stead.¹ If there are junior incumbrancers, they should be made defendants, because they have the right to redeem either or all of the antecedent mortgages.²

§ 61. Class suits — Numerous parties.— An equity rule provides: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of the absent parties."³ This rule is declaratory of the rule as it previously existed, the only change made being the provision in the last clause, that the decree shall be without prejudice to all the absent parties.⁴

§ 62. Parties where real property is subject to successive estates.— "In all cases in which an estate is claimed against another, by a person deriving title under a settlement made either by deed or will, it is necessary to make all the persons claiming under the settlement parties to the suit down to the person entitled to the first vested estate of inheritance, either in fee or in tail, inclusive;" but it is not necessary to bring before the court those claiming in remainder or reversion; "the first person in existence who is entitled to a vested estate of inheritance is sufficient to represent all remainders behind him."⁵

¹ Story's Eq. Pl., secs. 188, 189, 190, 191, 192; *Whitney v. McKinney*, 7 Johns. Ch. 145.

² *United States v. Sturges*, 1 Paine, 525, Fed. Cas. No. 16,414; 1 Daniell, 306; Story's Eq. Pl., sec. 186.

³ Equity Rule 48.

⁴ 1 Daniell, 331-337; Story's Eq. Pl., secs. 97, 120, 121, 122; *West v.*

Randall, 2 Mason, 181, Fed. Cas. No. 17,424; *Piatt v. Oliver*, 2 McLean, 267, Fed. Cas. No. 11,115; *Smith v. Swomstedt*, 16 How. 288.

⁵ 1 Daniell, 316, 317, 318, 319; *Redesdale* (6th Am. ed.), 199, 200; *Insurance Co. v. Cammet*, 2 Edw. Ch. 127; 2 Maddock's Ch. 146.

§ 63. **Nominal parties.**— No person should be made a party, either as plaintiff or defendant, to a suit in equity, who has no interest, beneficial or otherwise, in the subject-matter, and for or against whom, if brought to a hearing, there can be no decree; and upon this principle, persons who are mere witnesses, and may be examined as such, ought not to be made defendants for the purposes of discovery. But to this rule there are some exceptions. Officers and members of a corporation may, under certain restrictions, be joined as defendants in a suit against the corporation, for the purpose of discovery; and where the bill alleges fraud in connection with the transaction under investigation, and it is shown that the agents, attorneys and solicitors of the principal defendant participated in the fraud, they may be properly made defendants.¹ It is provided by an equity rule that, “where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.”² The courts of the United States will not suffer their jurisdiction to be ousted by the mere joinder or non-joinder of formal parties, but will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before them; whenever it can be done without prejudice to the rights of others.³

§ 64. **Parties jointly and severally liable.**— An equity rule provides that: “In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court,

¹ 1 Daniell, 393-401.

² Equity Rule 54.

³ Wormley v. Wormley, 8 Wheat. 451; Removal Cases, 100 U. S. 457; Barney v. Latham, 103 U. S. 205; Harter v. Kernochan, 103 U. S. 562; Taylor v. Holmes, 14 Fed. R. 499; Mary-land v. Baldwin, 112 U. S. 490.

as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.”¹ This equity rule is a literal copy of the thirty-second of the orders of the High Court of Chancery in England of 1841, and creates an exception to the general rule in equity which requires the plaintiff to bring before the court all persons legally or beneficially interested in the suit.² Another exception to that general rule is, that where two persons jointly owe a debt and one of them is beyond the process of the court, and equity has jurisdiction of the subject-matter, a decree may be taken against the debtor before the court and subject to its jurisdiction for the whole amount of the debt.³

§ 65. Objection for want of parties, when and how raised.

Whenever a want of parties appears on the face of the bill, and there are no allegations in the bill showing a sufficient excuse for the omission of such parties, the defect may be taken advantage of by demurrer; otherwise the question should be raised by plea or answer, averring the facts necessary to show the defect of parties, and the names and description of the persons whose omission from the bill has caused the alleged defect of parties.⁴ An equity rule provides that: “Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk’s order book, in the form or to the effect following (that is to say): ‘Set down upon the defendant’s objection for want of parties.’ And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defend-

¹ Equity Rule 51.

² 1 Daniell, 284, 285.

³ 1 Daniell, 258; *Lewis v. United States*, 92 U. S. 618.

⁴ *Redesdale* (6th Am. ed.), 206, 207; Equity Rule 53.

1 Daniell, 384–388; *Story v. Livingston*, 13 Pet. 359, 375; *Carey v. Brown*, 92 U. S. 171; *Segee v. Thomas*, 3 Blatch. 11, Fed. Cas. No. 12,633;

ant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."¹ And if the bill be dismissed for want of parties it should be without prejudice.²

§ 66. **Same — Objection at the hearing.**— It is provided by an equity rule that: "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."³ But the court cannot make a decree if the rights of an absent party would be necessarily affected thereby, and objection for such a defect of parties can be made either at the hearing or in the appellate court;⁴ and if the objection be made in the circuit court, the cause will be ordered to stand over in order to make new parties;⁵ and if the objection be made in the appellate court, and there is merit in the cause, it will be remanded, with leave to bring in new parties.⁶

§ 67. **Parties under disabilities — Infants, idiots, lunatics and married women.**— According to the long established practice of the High Court of Chancery of England, infants sue by next friend and defend by guardian *ad litem*. And an idiot or lunatic sues and defends by the committee of his estate; but if there be no committee, or he be interested in the suit, the lunatic or idiot sues by next friend and defends by guardian *ad litem*; the committee, if there be one, should always be a party to the suit, either as plaintiff or defendant.⁷ An equity rule provides that: "Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so

¹ Equity Rule 52.

² House v. Mullen, 22 Wall. 42; Kendrick v. Dean, 97 U. S. 423.

³ Equity Rule 53.

⁴ Coiron v. Millaudon, 19 How. 113, 115; Lewis v. Darling, 16 How. 1.

⁵ West v. Randall, 2 Mason, 181,

Fed. Cas. No. 17,424; Bank v. Epping, 3 Woods, 391, 395.

⁶ Lewis v. Darling, 16 How. 1.

⁷ 1 Daniell, 92-117, 219-248.

incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such order as the court may direct for the protection of infants and other persons.”¹ In suits by a married woman her husband should be joined in all cases where they have no conflicting interests; but if their interests are opposed she should file her bill by her next friend and make her husband a party defendant; and where a suit is brought against a married woman, her husband should, as a rule, be joined as a party defendant.²

¹ Equity Rule 87.

Butler, 6 Fed. R. 228; Taylor v.

² 1 Daniell, 118-172, 205-219; Bein Holmes, 14 Fed. R. 498.
v. Heath, 6 How. 228; Douglas v.

CHAPTER V.

PLACE OF BRINGING SUIT—TERRITORIAL JURISDICTION.

(a) GENERAL PRINCIPLES.

- § 68. Definition of jurisdiction.
- 69. Civil and common-law classification of actions—Local and transitory actions—Real, personal and mixed actions. ●
- 70. Title to real estate controlled by the *lex loci rei sitæ*.
- 71. Suits for the recovery of, or for damage to, real property, local.
- 72. Same—Trespass *quare clausum*.
- 73. The distinction between local and transitory actions preserved in federal procedure.
- 74. Same—Ruling in *Doulson v. Matthews* approved by the United States supreme court.
- 75. Suits in equity are either local or transitory.
- 76. Same—Railroad foreclosure suits.
- 77. Distinction between local and transitory actions not affected by federal procedure act.

(b) HISTORY OF FEDERAL LEGISLATION ON TERRITORIAL JURISDICTION.

- 78. Territorial jurisdiction controlled by federal legislation—Act of September 24, 1789.
- 79. Same—Act of May 4, 1858.
- 80. Same—Act of June 1, 1872.
- 81. Same—United States Revised Statutes of 1878.
- 82. Same—Act of March 3, 1875.

§ 83. Same—Acts of March 3, 1887, and August 13, 1888.

(c) THE PRESENT STATE OF THE LAW.

- 84. General statutes in force in relation to territorial jurisdiction.
- 85. Same—*Quære*: Has section 740, United States Revised Statutes, been repealed?
- 86. The place of bringing suit—The general rule.
- 87. Same—When jurisdiction is based on diverse citizenship.
- 88. Same—Suits against domestic corporations.
- 89. Same—Suits against railroad corporations.
- 90. Same—Suits against national banking associations.
- 91. Same—Suits against aliens and foreign corporations.
- 92. Same—Suits arising under patent laws of the United States.
- 93. Same—Suits arising under the trade-mark laws of the United States.
- 94. Same—Suits under laws of the United States to protect commerce.
- 95. Same—Persons suing or sued in a representative capacity.
- 96. Local suits under section 8, act of March 3, 1875.
- 97. Where ancillary or dependent suits are to be brought.
- 98. The right to be sued in a particular district waived by general appearance.

(a) GENERAL PRINCIPLES.

§ 68. Definition of jurisdiction.—The term "jurisdiction," as applied to courts of justice, signifies, (1) primarily, the power

and authority vested in them by law to hear and determine causes; to adjudicate upon the rights of parties in the subject-matter of litigation between them: this may be properly called the substantive jurisdictional power of courts.¹ And (2) the term "jurisdiction" signifies, secondarily, the district or territorial limits within which the power and authority of courts of justice are to be exercised; the venue of actions, or the place of bringing suits, or where suits should be brought and tried: it is called the territorial jurisdiction of courts.² In discussing the jurisdiction of the federal courts, in both the text-books and in adjudicated cases, these two meanings or significations of the word "jurisdiction" have frequently been confused and confounded. This chapter will be devoted to the discussion of the territorial jurisdiction of the federal courts, or the place of bringing suit, and this matter has been kept distinct, as far as possible, from the substantive jurisdiction of the courts.

§ 69. Civil and common-law classification of actions — Local and transitory actions — Real, personal and mixed actions.—The legal principles and doctrines which regulate and control the territorial jurisdiction of courts constitute a fundamental element in both national and international jurisprudence, and the subject has engaged the patient thought and has been illuminated by the learning and genius of the most eminent and erudite publicists and jurists known in the history of civilization; and these principles and doctrines are closely related to the great principle, that every nation has exclusive jurisdiction and sovereignty over all property, both movable and immovable, situated within its territory, and has the sole right to regulate and control its ownership, use, "transfer, descent and testamentary disposition," and to administer justice in all places within its territory. In both the Roman civil law and the English common law the principles which determined the territorial jurisdiction, or place where suits should be brought and tried, arose logically out of the inherent nature and character of the suits themselves, and became

¹United States v. Arredondo, 6 Pet. 691; Rhode Island v. Massachusetts, 12 Pet. 657. noyer v. Neff, 95 U. S. 714-748; Northern Indiana R. Co. v. Michigan Central R. Co., 15 How. 240.

²Bissell v. Briggs, 9 Mass. 462; Pen-

permanent and fundamental elements in those two great systems of jurisprudence and their derivative systems. Both the Roman and English jurisprudence divided actions into real, personal and mixed, and also into local and transitory actions; and the same distinctions and principles as to the classification of remedies pervade both systems, though there is some difference as to details.¹

In both the state and federal courts matters of jurisdiction are largely regulated and controlled by statute; but those statutes, as a rule, must be construed and applied in the light of the nature and character of suits and the settled maxims and principles of jurisprudence in relation to the jurisdiction of courts;² and, as our system of remedial justice is based upon the English common-law and equity systems, it is important to present a full and clear statement of the common-law classification of actions, which can best be shown by statements from the common-law text-books.

At common law "actions are commonly divided into criminal, or such as concern pleas of the crown, and civil, or such as concern common pleas. And these latter are again divided into real, personal and mixed actions. In a real action the proceedings are *in rem* for the recovery of real property only; in a personal action they are *in personam* for the recovery of specific articles, or of some pecuniary satisfaction or recompense; and in a mixed action they are *in rem et personam*, for the recovery of real property and damages for withholding it. Personal actions are *ex contractu vel ex delicto*; being founded upon contracts or for wrongs independently of contract."³ And "the venue in personal actions, or county where the action is laid and intended to be tried, is local or transitory. When the action could only have arisen in a particular county it is local, and the venue must be laid in that county; for if it be laid elsewhere the defendant may demur to the declaration, or the plaintiff, on the general issue, will be nonsuited at the trial. Such are all real and mixed actions and actions of ejectment and trespass *quare clausum fregit*. But where the action might have arisen in any county, as upon contracts, it is transitory, and the plaintiff may in general lay the venue wher-

¹ Story on Conflict of Laws, ch. 14.

³ 1 Tidd's Practice, 1.

² Casey v. Adams, 102 U. S. 66.

ever he pleases; subject, however, to its being changed by the court if not laid in the very county where the action arose.”¹

“The venue is either local or transitory; if local it must be laid and the cause tried in the county in which the cause of action arose or the injury was really committed. . . . And if the venue be transitory it may be laid in the declaration and the cause tried in any county, subject also then to its being changed by the court in some cases if not laid in the county where the cause of action really arose. . . . When the cause of action could only have arisen in a particular place or county it is local and the venue must be laid therein. As in real actions, mixed actions, waste, *quare impedit*, or ejectment for the recovery of the seisin or possession of land or other real property. So actions, though merely for damages occasioned by injuries to real property, are local, as trespass on the case for nuisance, or waste, to houses, lands, water-courses, right of common, ways, or other real property, unless there were some contract between the parties on which to ground an action. And if the land be out of this kingdom the plaintiff has no remedy in the English courts; at least if there be a court of justice in the country in which the land is situate to which he may resort. . . . Where, however, an injury has been caused by an act done in one county to land situate in another, or whenever the action is founded upon two or more material facts which took place in different counties, the venue may be laid in either. The venue in replevin is local. . . . A *scire facias* on a judgment, being only a continuation of a former suit and not an original proceeding, must be laid in the county where the venue was first laid, the defendant being supposed to reside in that county. Debt for arrears of a rent charge against the pignor of the profits, not being the original grantor, is local, the defendant being chargeable in respect of his possession and not on the contract. . . . In all actions for injuries *ex delicto* to the person or to personal property the venue is in general transitory, and may be laid in any county, though committed out of the jurisdiction of our courts or of the king’s dominions. . . . In general, also, actions founded upon contracts are transitory, though made and were stipulated

¹ Tidd’s Practice, 369.

to be performed out of the kingdom. . . . In an action upon a lease for non-payment of rent or other breach of covenant, when the action is founded on the privity of contract, it is transitory and the venue may be laid in any county; but when the action is founded on the privity of estate it is local, and the venue must be laid in the county where the estate lies."¹

§ 70. Title to real estate controlled by the *lex loci rei sitæ*.—It is an inflexible rule of the English common law, and a principle of universal application in American jurisprudence, that the acquisition and ownership of real estate, and all the means by which the title to real estate is transferred from one person to another, whether by deed, or judicial proceedings, or descent, or will and testament, and the construction and effect of all instruments intended to convey real property, are governed and controlled exclusively by the laws of the country or state where the property is situated;² and such laws of the several states, being rules of property, are binding upon and are followed by the federal courts;³ and no action or suit can be maintained in one state or country to recover the title or possession of land situated in another country or state.⁴

¹ 1 Chitty, Pl. (ed. 1840), 267-269.

² Story, Conflict of Laws, ch. 10; United States v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheat. 577; Kerr v. Moon, 9 Wheat. 566; McCormick v. Sullivant, 10 Wheat. 192; Brine v. Insurance Co., 96 U. S. 635; Robertson v. Pickrell, 109 U. S. 608; Olcott v. Bynum, 17 Wall. 44; McGoon v. Scales, 9 Wall. 23; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460; s. c., 22 Am. Dec. 47; Baxter v. Willey, 9 Vt. 276; s. c., 31 Am. Dec. 623; Middleton v. McGrew, 23 How. 45; Byers v. McAuley, 149 U. S. 608.

³ Brine v. Insurance Co., 96 U. S. 635; Olcott v. Bynum, 17 Wall. 44; United States v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheat. 577; McGoon v. Scales, 9 Wall. 23; Robertson v. Pickrell, 109 U. S. 608; Butz v. Muscatine, 8 Wall. 575; Shelly v. Guy, 11 Wheat. 361; Christy v. Pridgeon, 4 Wall. 196; League v. Egery, 24 How.

264; St. John v. Chew, 12 Wheat. 153; Thatcher v. Powell, 6 Wheat. 119; Henderson v. Griffin, 5 Pet. 151; Williamson v. Suydam, 6 Wall. 723; Beauregard v. New Orleans, 18 How. 497; Ross v. M'Lung, 6 Pet. 283; Williams v. Kirtland, 13 Wall. 306; Smith v. McCann, 24 How. 398; Morgan v. Curtenius, 19 How. 8; Bondurant v. Watson, 103 U. S. 281; Blanchard v. Brown, 3 Wall. 245; Lippincott v. Mitchell, 94 U. S. 767; Gage v. Pumphelly, 115 U. S. 454; Ridings v. Johnson, 128 U. S. 212; Hanrick v. Patrick, 119 U. S. 156; Clement v. Packer, 125 U. S. 309; Gormley v. Clark, 134 U. S. 338; Halstead v. Buster, 140 U. S. 273; Cross v. Allen, 141 U. S. 528; Peters v. Bain, 133 U. S. 670; Arrowsmith v. Gleason, 129 U. S. 86; Parker v. Dacres, 130 U. S. 43.

⁴ Watts v. Waddle, 6 Pet. 389; Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co., 15 How. 233; Story,

§ 71. Suits for the recovery of, or for damage to, real property, local.— All real and mixed actions are local; all actions for the recovery of the seisin and possession of land or other real property, and all actions for the recovery of damages for injuries to real property, are local; such as actions of ejectment, *quare clausum fregit*, trespass or trespass on the case for nuisance, or waste, to houses, lands, water-courses, right of common, ways, or other real property; and all such actions must be brought in the county or district where the land is situated.¹

§ 72. Same — Trespass *quare clausum fregit* — *Doulson v. Matthews*.— By the rules of the common law, from the time of its most ancient annals down to the present time, trespass *quare clausum fregit*, or suit for damages for trespass to lands, has been classed as a local action. Lord Mansfield, one of England's greatest judges, being impressed by the inconvenience and failure of justice frequently caused by not allowing this action to follow the person of the defendant, attempted to break down the classification of this action as local, and convert it into a transitory action; and he actually held in two cases decided by him at *nisi prius* that an action might be sustained in England for trespass to land lying in the foreign dominions of the British crown. But the influence of the learning and genius of even Lord Mansfield was not sufficient to overturn the ancient rule. In 1792 the king's bench overruled the two cases decided by Lord Mansfield at *nisi prius*, and affirmed the ancient common-law rule. That ruling was made in the case of *Doulson v. Matthews*,² which was an action of trespass for entering plaintiff's dwelling in Canada and expelling him. The declaration contained two counts: the first for the trespass upon the land, and the second for taking away the plaintiff's goods; there was no proof to sustain the second

Conflict of Laws, sec. 543; *Massie v. Watts*, 6 Cranch, 148.

¹ 1 Chitty, Pleading (ed. 1840), 267; 1 Tidd's Practice, 369; *Roach v. Dameron*, 2 Humph. (Tenn.) 425; *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *Watts v. Kinney*, 6 Hill (N. Y.), 82; *American Union Telegraph Co. v. Middleton*, 80 N. Y.

408; *Cragin v. Lovell*, 88 N. Y. 263; *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 15 How. 233; *Ellenwood, Adm'r, v. Marietta Chair Co.*, 158 U. S. 105-108; *Story on Conflict of Laws*, sec. 538; *McKenna v. Fisk*, 1 How. 241-277.

² 4 Term (Durnford & East) Reports, 503.

count, and the only question in the case was whether or not an action could be sustained in the courts of England for a trespass to lands in Canada. At the trial Lord Kenyon, Chief Justice, was clearly of opinion that the cause of action stated in the first count was local, and, there being no proof to sustain the second count, the plaintiff was nonsuited. A motion was made to set aside the nonsuit, which the court refused, Buller, Justice, saying: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

In an early case, the supreme court of Tennessee, speaking by Green, Justice, said: "This is an action of trespass for breaking and entering the plaintiff's close. In its nature it is a local action, the court of the county in which the land is situated alone having jurisdiction. In such action it is necessary that the venue be proved. A verdict will not cure a deficiency of proof. If, as argued, we were to presume that there was proof of this fact, because the jury have found a verdict affirming its existence, why might we not in every case presume there was evidence sufficient to justify the verdict? If that were so, no new trial could be obtained on account of a deficiency of proof. The record asserts that it embodies all the evidence that was given in the case. There is in it no evidence that the trespass was committed in Knox county. On that account the judgment must be reversed and a new trial awarded."¹

§ 73. The distinction between local and transitory actions preserved in federal procedure.—The jurisdiction of the federal courts is derived from the federal constitution and the laws passed in pursuance thereof by congress; but the federal statutes prescribing the place where suits shall be brought are framed upon the theory that the distinction between local and transitory actions, and the body of legal rules arising out of such distinction, constitute an essential and fundamental ele-

ment in the system of remedial justice administered by the federal courts, and, in the practical administration of justice, the courts have so construed and applied the statutes. So that it may be safely stated as a proposition of universal application that the substantial doctrines and principles relating to the distinction between local and transitory actions are enforced in suits in the federal courts.¹

The case of *Livingston v. Jefferson*, decided December 5, 1811, in the United States circuit court for the district of Virginia, was an action of trespass *quare clausum fregit*, brought by Edward Livingston, a citizen of New York, against Mr. Jefferson, a citizen of the state of Virginia, and a former president of the United States, for removing the plaintiff from the Batture in New Orleans, in the territory of Orleans, but which at the time the case was heard was the state of Louisiana; the trespass was alleged to have occurred at the city of New Orleans, and the venue was then laid, under a *videlicet*, at Richmond, in the county of Henrico and district of Virginia; by proper pleading the question of jurisdiction was raised and presented by the defendant; at that time the only federal statute in force prescribing the place where suit should be brought was the eleventh section of the original judiciary act, which provided: "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."² The circuit court held that the action was local, and that it had no jurisdiction of a trespass committed on lands lying within the United States, but beyond the limits of the district for which the court was held, although the trespasser be a resident of the district and found therein. In deciding upon the question of jurisdiction, Chief Justice Marshall, sitting as circuit justice, said: "The sole question now to be

¹ U. S. R. S., secs. 738, 739, 740, 741, U. S. 105-108; Northern Ind. R. R. 742; *Livingston v. Jefferson*, 1 Brock. Co. v. Michigan Cent. R. R. Co., 15 203, Fed. Cas. No. 8,411; McKenna v. How. 233.
Fisk, 1 How. 241-249; *Ellenwood*, ² 1 U. S. Stat. at L., ch. 20, sec. 11, Adm'r, v. Marietta Chair Co., 158 p. 78.

decided is this: Can this court take cognizance of a trespass committed on lands lying within the United States, and without the district of Virginia, in a case where the trespasser is a resident of and is found within the district? I concur with my brother judge in the opinion that it cannot." . . .

"The doctrine of actions local and transitory has been traced up to its origin in the common law, and, as has been truly stated on both sides, it appears that originally all actions were local; that is, that according to the principles of the common law every fact must be tried by a jury of the vicinage. The plain consequence of this principle is, that those courts only could take jurisdiction of a case who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts, therefore, necessarily becomes local with respect to every species of action. But the superior courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surrey or Middlesex, the necessity of averring in the declaration that the cause of action arose in either county could not be produced in order to give the court jurisdiction, but to furnish a venire. For the purpose of jurisdiction it would unquestionably be sufficient to aver that the transaction took place within the realm. This, however, being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification, and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue; and where the contract exhibits on its face evidence of the place where it was made, the party is at liberty to aver that such place lies in any county in England. This is known to be a fiction. Like an ejectment, it is the creature of the court, and is moulded to the purposes of justice, according to the view which its inventors have taken of its capacity to effect those purposes. It is, however, of undeniable extent. It has not absolutely prostrated all distinctions of place, but

has certain limits prescribed to it, founded in reasoning satisfactory to those who have gradually fixed these limits. It may well be doubted whether at this day they are to be changed by a judge not perfectly satisfied with their extent. This fiction is so far protected by its inventors that the averment is not traversable for the purpose of defeating an action it was invented to sustain; but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

“In the case at bar it is traversed for that purpose, and the question is whether this be a case in which such traverse is sustainable; or, in other words, whether courts have so far extended their fiction as, by its aid, to take cognizance of trespasses on lands not lying within those limits which bound their process. They have, without legislative aid, applied this fiction to all personal torts, and to all contracts wherever executed. To this general rule contracts respecting lands form no exception. It is admitted that on a contract respecting lands an action is sustainable wherever the defendant may be found; yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause; yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed, by the opposing consideration, that if the action be disallowed the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court. That this consideration should lose its influence, where the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence, where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it.

“The distinction taken is that actions are deemed transitory, where transactions on which they are founded might have

taken place anywhere; but are local where their cause is in its nature necessarily local. If this distinction be established; if judges have determined to carry their innovation on the old rule no further; if, for a long course of time, under circumstances which have not changed, they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this limit. This distinction has been repeatedly taken in the books and recognized by the best elementary writers, especially Blackstone, from whose authority no man will lightly dissent. 3 Bl. Com. 294. See also Mr. Chitty's note (4) in his edition of Blackstone (vol. 2, p. 233). He expressly classes an action for trespass on lands with those actions which demand their possession, and which are local, and makes only those actions transitory which are brought on occurrences that might happen in any place. From the cases which support this distinction, no exception, I believe, is to be found among those that have been decided in court on solemn argument. One of the greatest judges who ever sat on any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction between taking jurisdiction in cases of contract respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of *Mostyn v. Fabrigas*, 1 Cowp. 166, Lord Mansfield stated the true distinction between proceedings which are *in rem*, in which the effect of a judgment cannot be had unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong, which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled had this distinction been laid down in an action deemed local. It may be termed an *obiter dictum*. He recites in that opinion two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic majesty; but both those decisions were at *nisi prius*. And though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction

of the court. In a subsequent case (*Doulson v. Matthews* (1792), 4 Durn. & E., 4 Term R. 503), these decisions are expressly referred to and overruled, and the old distinction is affirmed.

“It has been said that the decisions of British courts, made since the Revolution, are not authority in this country. I admit it—but they are entitled to that respect which is due to the opinions of wise men who have maturely studied the subject they decide. Had the regular course of decisions previous to the Revolution been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event, this court might have felt itself bound to disregard them; but where the ancient rule has been long preserved, and a modern attempt to overrule it has itself been overruled since the Revolution, I consider the last adjudication in no other light than as the true declaration of the ancient rule.

“According to the common law of England, then, the distinction taken by the defendant’s counsel between actions local and transitory is the true distinction, and an action of *quare clausum fregit* is a local action. This common law has been adopted by the legislature of Virginia. Had it not been adopted I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by competent authority. But it has been said that this rule of the common law is impliedly changed by the act of assembly which directs that a jury shall be summoned from the bystanders. Were I to discuss the effect of this act in the courts of the state, the inquiry whether the fiction already noticed was not equivalent to it in giving jurisdiction would present itself. There are also other regulations, as that the jurors should be citizens, which would deserve to be taken into view. But I pass over these considerations, because I am decidedly of the opinion that the jurisdiction of the courts of the United States depends exclusively on the constitution and laws of the United States.

“In considering the jurisdiction of the circuit courts as defined in the judicial act (1 Stat. 73), and in the constitution which that act carries into execution, it is worthy of observation that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed in order to give it the right to try the cause, and consequently the same defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction which produces the inconvenience of a clear right without a remedy. I must submit to it. The law upon the demurrer is in favor of the defendant.”¹

§ 74. Same — Ruling in *Doulson v. Matthews* approved by United States supreme court. In the year 1843 the case of *McKenna v. Fisk*,² “a case in all its particulars like” *Doulson v. Matthews*, was decided by the supreme court of the United States, in which the ruling in the latter case was approved and adopted, and declared to be the settled doctrine in the courts of the states of the American Union. McKenna sued Fisk in the circuit court of the United States for the District of Columbia and county of Washington for trespass to both real and personal property situated in the county of Allegany, state of Maryland, laying the venue, under a *videlicet*, in the county of Washington, District of Columbia. The trial judge excluded all evidence offered by plaintiff of the trespass upon both the real and personal estate, upon the ground that the trespasses were committed without the territorial jurisdiction of the court. The supreme court held that the counts of the declaration averring a trespass upon the personal property stated a transitory action, and those counts in the declaration averring trespass upon the real estate stated a local action, and that the circuit court had jurisdiction of the former, but not of the latter.

¹ *Livingston v. Jefferson*, 1 Brock. 21 How. (U. S.) 241-249.
203, Fed. Cas. No. 8,411.

The case was reversed and remanded for a trial upon the counts of the declaration setting up a trespass upon the personal property, and in the course of its opinion the court said: "The evidence offered as to the local count was certainly not competent; but that is because the venue is local, and cannot be changed into any other county than where the trespass to the realty was done, and never can be carried out of the sovereignty in which the land is. But it is an established rule that in transitory actions a venue is only necessary to be laid to give a place for trial. . . . The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England and in the states of this Union, and, in the absence of statutory provisions, in the trial of them must apply the same common-law principles which regulate the mode of bringing such actions, the pleadings, and the proofs."

The same doctrine was announced by the United States supreme court in *Ellenwood v. Marretta Chair Co.*,¹ decided in May, 1895. That suit was brought in the circuit court of the United States for the southern district of Ohio for trespass to land situated in West Virginia, and the cutting down and asportation of timber. Holding that the circuit court had no jurisdiction of the cause, the supreme court said: "By the common law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or possession of the land itself, is a local action, and can only be brought within the state in which the land lies. The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. But the petition, as amended by the plaintiff, on motion of the defendant, and by order and by leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the

¹ 158 U. S. 105-108.

timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The circuit court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the cause to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea."

§ 75. Suits in equity are either local or transitory.— Courts of equity act either *in personam* or *in rem*; and the distinction between local and transitory actions prevails in suits in equity as well as in actions at law. If a bill in equity presents for the decision of the court a naked issue of title to real estate, the suit is local, and must be brought in a court within whose territorial jurisdiction the property is situated.¹ If, by the case made by the bill, the defendant is liable to the plaintiff on a contract, or as trustee, or as the holder of a legal title acquired by a fraud practiced on the plaintiff, then the action is transitory, and the suit may be filed wherever the person of the defendant may be found; "and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest the jurisdiction of the court;" and "in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree."²

§ 76. Same — Railroad foreclosure suits.— A bill was filed in the United States circuit court for the district of the state of Iowa to foreclose a mortgage on a railroad partly in the

¹ *Massie v. Watts*, 6 Cranch, 148; *v. Columbus, C. & I. C. Ry. Co.*, 57 Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233; *Corbett v. U. S.* 298; *Hart v. Sanson*, 110 U. S. 151; *Carpenter v. Strange*, 141 U. S. 87; *Mitchell v. Bunch*, 2 Paige (N. Y. Ch.) 603; *Penn v. Lord Baltimore*, 1 Vesey, Sr. 444.

² *Massie v. Watts*, 6 Cranch, 148; *Hollingsworth v. Barbour*, 4 Pet. 475; *Boswell's Lessees v. Otis*, 9 How. 336; *Muller v. Dows*, 94 U. S. 444; *Lynde*

state of Iowa and partly in the state of Missouri, owned by a corporation created by the state of Iowa. The mortgagors being within the jurisdiction of the court, a decree of foreclosure was entered, directing a master to sell the entire line of the railroad lying in the two states, and to make a deed to the purchaser, and that the trustees who brought the suit, and also the defendant corporation, the mortgagor, make deeds to the purchaser, and that the mortgagor deliver possession to the purchaser. Upon appeal it was insisted that the decree of foreclosure was void in so far as it directed a foreclosure and sale of property not within the territorial jurisdiction of the court; but the United States supreme court overruled that contention, and upheld the decree of foreclosure, saying in its opinion: "Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of the courts of chancery in this country is sufficient to authorize such a decree as was made here. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants."¹

§ 77. Distinction between local and transitory actions not affected by federal procedure acts.—Federal legislation prescribing where persons shall be sued proceeds in recognition of the distinction between local and transitory actions. The supreme court of the United States, speaking by Chief Justice Waite, said: "The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued included such suits as were local in their character, either by statute or by common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated."²

¹ *Muller v. Dows*, 94 U. S. 444. ² *Casey, Receiver, v. Adams*, 192 U. S. 66-68.

(b) HISTORY OF FEDERAL LEGISLATION ON TERRITORIAL JURISDICTION.

§ 78. Territorial jurisdiction controlled by federal legislation — Act of September 24, 1789. — Subordinate to the fundamental principles of jurisprudence and the fixed rules of law arising out of the inherent character of local and transitory actions,¹ and the absolute right of every sovereignty to prescribe laws for the acquisition, ownership and disposition of property within its territory,² and the binding force of the laws of the several states of the Union which constitute rules of property,³ the territorial jurisdiction of suits in the circuit courts of the United States is regulated and controlled by federal legislation enacted for that purpose, pursuant to the power vested in congress by the federal constitution.

The existing statutory regulations upon this subject are not the results of any single act of congress, but they have resulted from a series of enactments beginning with the original judiciary act and ending with the act of August 13, 1888; and the whole body of existing rules in regard to the territorial jurisdiction of the federal courts, or the body of rules prescribing where suits shall be brought in those courts, is a development or evolution of legislation and judicial construction, beginning with the organization of the federal judicial system and growing with the general progress and development of the country.

¹ *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *McKenna v. Fisk*, 1 How. 241-249; *Ellenwood, Adm'r, v. Marietta Chair Co.*, 158 U. S. 105-108; *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 15 How. 233; *Douglas v. Matthews*, 4 Term (Durnford & East) R. 503; *Roach v. Damron*, 2 *Humph. (Tenn.)* 427; *Watts v. Kinney*, 6 *Hill (N. Y.)*, 82; *American Union Telegraph Co. v. Middleton*, 80 *N. Y.* 408; *Cragin v. Lovell*, 88 *N. Y.* 263.

² *Story, Conflict of Laws*, ch. 10; *United States v. Crosby*, 7 *Cranch*, 115; *Clark v. Graham*, 6 *Wheat.* 577; *Kerr v. Moon*, 9 *Wheat.* 566; *McCormick v. Sullivant*, 10 *Wheat.* 192; *Brine v. Insurance Co.*, 99 *U. S.* 635;

Robertson v. Pickrell, 109 *U. S.* 608; *Olcott v. Bynum*, 17 *Wall.* 44; *McGoon v. Scales*, 9 *Wall.* 23; *Sneed v. Ewing*, 5 *J. J. Marsh. (Ky.)* 460; *s. c.*, 22 *Am. Dec.* 47; *Baxter v. Willey*, 9 *Vt.* 276; *s. c.*, 31 *Am. Dec.* 623; *Middleton v. McGrew*, 23 *How.* 45; *Byers v. McAuley*, 149 *U. S.* 608.

³ *Brine v. Insurance Co.*, 96 *U. S.* 635; *Robertson v. Pickrell*, 109 *U. S.* 608; *Lippincott v. Mitchell*, 94 *U. S.* 767; *Gage v. Pumpelly*, 115 *U. S.* 454; *Ridings v. Johnson*, 128 *U. S.* 212; *Clement v. Packer*, 125 *U. S.* 309; *Gormley v. Clark*, 134 *U. S.* 338; *Halstead v. Buster*, 140 *U. S.* 273; *Cross v. Allen*, 141 *U. S.* 528; *Peters v. Bain*, 133 *U. S.* 670; *Parker v. Dacres*, 130 *U. S.* 43.

The only provision contained in the original judiciary act in regard to the place where suits shall be brought is contained in the eleventh section thereof, and is as follows: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."¹

§ 79. Same — Act of May 4, 1858.— The law remained as in the original judiciary act until May 4, 1858, when congress passed another act of two sections upon the subject, which is as follows: (1) "That all suits not of a local nature, hereafter to be brought in the circuit and district courts of the United States, in a district in any state containing more than one district, against a single defendant, shall be brought in the district in which the defendant resides; but if there be two or more defendants residing in different districts in the same state, the plaintiff may sue in either district and issue a duplicate writ against the defendants, directed to the marshal of any other district within the state in which any of the defendants reside, on which duplicate writ the clerk issuing the same shall indorse that it is a true copy of a writ sued out of the court of the proper district, and such original and duplicate writs so issued shall, when executed and returned into the office from which so issued, constitute one suit and be proceeded on accordingly; and upon the judgment rendered in a suit so brought, process or execution may be issued, directed to the marshal of any district in the same state. And in suits of a local nature where the defendant resides in a different district in the same state than the one in which the suit is brought, the plaintiff may have original and final process against such defendant directed to the marshal of the district in which he resides." And (2) "That in all cases of a local nature at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another district within the same state, the plaintiff may bring his action or suit in the circuit or district court of either district, and the court in which

¹ 1 U. S. Stat. at L., ch. 20, sec. 11, pp. 78, 79.

any such action or suit shall have been commenced as aforesaid shall have jurisdiction to hear and decide the same, and to cause mesne or final process to be issued and executed as fully as if the land or other subject-matter were wholly within the district for which such court is constituted.”¹

§ 80. Same — Act of June 1, 1872.—By section 13 of an act passed June 1, 1872, it is provided: “That when in any suit in equity, commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant’s bill, at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, such order shall be published in such manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of such order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and to proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.”²

§ 81. Same — United States Revised Statutes of 1878.—The Revised Statutes of the United States of 1878 contains, in orderly statement, all of the statutes on the subject of territorial jurisdiction in force on December 1, 1873, sections 738, 739, 740, 741 and 742 thereof being as follows: Sec. 738. “When any defendant in any suit in equity to enforce any legal or equitable lien or claim against real or personal property within

¹ Acts of 35th Congress, 1st Sess.,
ch. 27.

² 17 U. S. Stat. at L., ch. 255, sec. 13,
p. 198.

the district where the suit is brought is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner as the court shall direct. If such absent defendant does not appear, plead, answer or demur within the time so limited, it shall be lawful for the court, upon proof of the service or publication of the said order, and of the performance of the directions contained therein, to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district. But the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only." Sec. 739. "Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases and the cases provided by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ." Sec. 740. "When a state contains more than one district, every suit not of local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the same state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal

of any district in the same state." Sec. 741. "In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides." Sec. 742. "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district in which such court is constituted."¹

§ 82. Same — Act of March 3, 1875.— By the first section of an act approved March 3, 1875, it is provided: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided." And section 8 of the same act covers the subject-matter of the act of May 4, 1858, embraced in sections 738 and 742, United States Revised Statutes, and extends the provisions of the act to suits commenced in the circuit court without confining them to suits in equity, and also adds a provision allowing defendants not personally notified to appear within one year and have the judgment set aside, and to plead in such suits. Said section 8 is as follows: "That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order

¹ U. S. R. S., secs. 738, 739, 740, 741, 742.

directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state. Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.”¹

§ 83. Same — Acts of March 3, 1887, and August 13, 1888. On March 3, 1887, an act was approved (the enrollment of which was corrected by act approved August 13, 1888) amending sections 1, 2, 3 and 10 of the aforesaid act of March 3, 1875,

¹18 U. S. Stat. at L., ch. 137, secs. 2, 8, pp. 470-473.

which enacts that the first section of the last-named act is amended so as to read as follows:

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising in the constitution or laws of the United States, or treaties made or which shall be made under their authority; or in which controversy the United States are plaintiffs or petitioners; or in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or a controversy between citizens of the same state claiming lands under grants of different states; or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”

Section 5 of the act of March 3, 1887, expressly continues in force section 8 of the aforesaid act of congress of March 3, 1875.

And section 4 of the act of March 3, 1887, provides: "That all national banking-houses established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." And all laws and parts of laws in conflict with the provisions of the act of March 3, 1887 (as corrected by the act of August 13, 1888), are repealed.¹

(c) THE PRESENT STATE OF THE LAW.

§ 84. General statutes in force in relation to territorial jurisdiction.—The only general statutes now in force relative to the territorial jurisdiction of the circuit courts of the United States, prescribing where suits shall be brought, are the act of March 3, 1887 (as corrected by the act of August 13, 1888), and section 8 of the act of March 3, 1875; the said section 8 of the last-named act having been expressly continued in force by section 5 of the act of March 3, 1887, and section 6 of the last-named act repealing all laws and parts of laws in conflict with that act.² And sections 740, 741 and 742 of the United States Revised Statutes are also still in force.³

§ 85. Same — Quære: Has section 740, United States Revised Statutes, been repealed?—Section 740 of the United States Revised Statutes, which provides that, when a state contains more than one district, every suit not of a local nature in the circuit or district courts, where there are two or more defendants residing in different districts of the same state, may be brought in either district and duplicate writs issued, is not either expressly repealed or continued in force by the act of March 3, 1887 (as corrected by the act of August 13, 1888);

¹ 24 U. S. Stat. at L., ch. 373, pp. 552–555; 25 U. S. Stat. at L., ch. 866, p. 434; 18 U. S. Stat. at L., ch. 137, sec. 8, pp. 472, 473.

² 24 U. S. Stat. at L., ch. 373, p. 552; 25 U. S. Stat. at L., ch. 866, p. 434;

18 U. S. Stat. at L., ch. 137, sec. 8, p. 472.

³ *Goddard et al. v. Mailler et al.*, 80 Fed. R. 422; *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. R. 608.

and it has been held at the circuit that this section of the Revised Statutes has not been repealed, but the question has not been passed upon by the supreme court of the United States.¹

§ 86. The place of bringing suit—The general rule.—The first section of the act of March 3, 1887 (as corrected by the act of August 13, 1888), enacts that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of five classes of suits of a civil nature at common law or in equity, viz.: “(1) Those which arise under the constitution or laws of the United States, or treaties made or which shall be made under their authority; (2) those in which the United States are plaintiffs or petitioners; (3) those in which there is a controversy between citizens of different states; (4) those in which there is a controversy between citizens of the same state claiming lands under grants of different states; and (5) those in which there is a controversy between citizens of a state and foreign states, citizens or subjects.”²

The general rule in regard to the place of bringing suit, or the district in which suit shall be brought under the above statute, is that every suit by original process or proceeding must be brought in the state of which the defendant is a citizen, and in the district in which he resides and of which he is an inhabitant.³ But to this general rule there are some exceptions which will be stated in the sections following.

§ 87. Same—When jurisdiction is based on diverse citizenship.—The first section of the statute now in force and under consideration, by special provision, makes an exception to the general rule above stated, as to the place of bringing suit. That exception is: That every suit by original process or proceeding between citizens of the United States, where the jurisdiction of the court is founded only on the fact that the

¹ *Goddard et al. v. Mailler et al.*, 80 Fed. R. 432; *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. R. 608.

² 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *Wilson v. Western Union Tel. Co.*, 34 Fed. R. 563.

³ 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41-45; *Re Keasby & Mattison Co.*, 160 U. S. 221-231.

action is between citizens of different states, must be brought only in the state of which the defendant is a citizen and in the district in which he resides and of which he is an inhabitant, or in the state of which the plaintiff is a citizen and in the district in which he resides and of which he is an inhabitant. The language of the statute is: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." These "concluding lines are to be read as a proviso to the general provision that no civil suits shall be brought except in the district whereof the defendant is an inhabitant."¹ And, under this proviso, where there are more plaintiffs or defendants than one, all of the plaintiffs must be competent to sue, and all of the defendants must be liable to be sued in the particular suit.²

§ 88. Same — Suits against domestic corporations.— For jurisdictional purposes it is conclusively presumed by the courts of the United States that all the stockholders of a corporation are citizens of the state which by its laws creates the corporation, and no averment to the contrary will be permitted. And for jurisdictional purposes a corporation is, by the courts of the United States, conclusively presumed to be a citizen of the state where it was created, and no averment to the contrary will be permitted. A corporation cannot change its residence or its citizenship. It "can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its resi-

¹ 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 343; *Smith v. Lyon*, 133 U. S. 315-320; *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41-45; *Re Keasby & Mattison Co.*, 160 U. S. 221-231; *Southern Pacific Co. v. Den-* ton, 146 U. S. 202-210; *Wilson v. Western Union Tel. Co.*, 34 Fed. R. 563.

² *Smith v. Lyon*, 133 U. S. 315-320; *Hooe v. Jamieson*, 166 U. S. 395; *Hooe v. Werner*, 166 U. S. 399.

dence in one state creates no insuperable objection to its power of contracting in another.”¹

And all suits upon original process or proceeding, against domestic corporations in the courts of the United States, must be brought in the state which created the corporation and in the district in which it resides and of which it is an inhabitant; unless the jurisdiction of the court in the cause is founded only on the fact that the action is between citizens of different states, in which event the suit may be brought in either the state of which the plaintiff is a citizen and in the district in which he resides and of which he is an inhabitant, or in the state of which the defendant corporation is a citizen and in the district in which it resides and of which it is an inhabitant.² And a corporation does not waive its right to be sued alone in the state which created it, by having and maintaining a usual place of business in another state in which it has not been incorporated.³

§ 89. Same — Suits against railroad corporations.— The fact that a railroad corporation, created by the laws of one state, has extended its line of railroad into another state, and has there constructed and owns and operates its railroad under a license and in conformity to the laws of the latter state, does not make such railroad corporation a corporation of the latter state, but for all jurisdictional purposes it continues to be a corporation and a citizen of the former state in which it was created, only; and in all suits in the circuit courts of the United States against a railroad corporation so created by one state and owning and operating a line of railroad in another state, it must be treated as a citizen of the state by which it was

¹ *Bank v. Earle*, 13 Pet. 588; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Muller v. Dows*, 94 U. S. 444; *Pennsylvania Co. v. Railroad Co.*, 118 U. S. 290; *Goodlett v. Railroad Co.*, 112 U. S. 391; *Shaw v. Quincy Min. Co.*, 145 U. S. 444-453; *Southern Pacific Co. v. Denton*, 146 U. S. 202-210; *Fales, Adm'x, v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. R. 673.

² *Southern Pacific Co. v. Denton*, 146 U. S. 202-210; *Re Keasby & Mattison Co.*, 160 U. S. 221-231; *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41-45.

³ *Shaw v. Quincy Min. Co.*, 145 U. S. 444-453; *Southern Pacific Co. v. Denton*, 146 U. S. 202-210; *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41-45; *Re Keasby & Mattison Co.*, 160 U. S. 221-231.

created, and sued in accordance with the requirements of the statute of March 3, 1887 (as amended by act of August 13, 1888).¹

§ 90. Same — Suits against national banking associations.

From the time of the organization of the government and the federal judicial system, it has been held by the supreme court of the United States that suits against corporations created by acts of congress of the United States were suits arising under the constitution and laws of the United States, and were therefore cognizable by the circuit courts without regard to the citizenship of the parties; and this principle was, of course, applied to national banking associations.²

But by the proviso to section 4 of the act of congress of July 12, 1882, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," it is enacted: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." The supreme court of the United States has held that the effect of this proviso was that nothing in the way of federal jurisdiction could be claimed by a national bank because of the source of its incorporation; and by the act national banks were placed before the law in this respect in the same condition as a bank not organized under the laws of the United States.³

By section 4 of the act of March 3, 1877 (as corrected by act

¹ *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545-572; *St. Joseph & Grand Island R. Co. v. Steel*, 167 U. S. 659.

² *Osborn v. United States Bank*, 9 Wheat. 738, 819; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Northern Pacific R. Co. v. Amato*, 144 U. S. 465;

Union Pacific Ry. Co. v. Harris, 158 U. S. 326.

³ 22 U. S. Stat. at L., ch. 290, sec. 4, p. 162; *Leather Mfg. National Bank v. Cooper*, 120 U. S. 778-784; *Whitmore v. Amoskeag National Bank*, 134 U. S. 527-530.

of August 13, 1888), it is declared: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." The supreme court of the United States has declared the intendment of this last statute to be, that the jurisdiction of the courts of the United States in regard to national banks is the same as in regard to corporations created by states, and individual citizens, and "deprives these banks of the privilege of suing or being sued, except in cases where diversity of citizenship would authorize an action to be brought."¹

§ 91. Same — Suits against aliens and foreign corporations. The constitution of the United States extends the judicial power to cases at law and in equity between citizens of a state and foreign states, citizens or subjects, and the existing statutes vest in the United States circuit courts original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity between citizens of a state and foreign states, citizens or subjects in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.² The provisions of section 1 of the act of March 3, 1887 (as corrected by act of August 13, 1888), prescribing that no civil suit shall be brought by original process or proceeding in any other district than that whereof the defendant is an inhabitant, or in cases where the jurisdiction is founded only on the fact that it is between citizens of different states only in the district of the residence of either the plaintiff or defend-

¹ 24 U. S. Stat. at L., ch. 373, sec. 4, U. S. 644-651; *Ex parte Jones*, 164 U. S. 552; 25 U. S. Stat. at L., ch. 866, S. 691-694.

sec. 4, p. 434; *Petri et al. v. Commercial National Bank of Chicago*, 142 U. S. Const., art. 3, sec. 2; 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

ant, refer to suits between citizens of the United States only, and are inapplicable to suits brought in the circuit courts of the United States against an alien, or a corporation created by a foreign state, empire or kingdom; but suits against an alien, or such foreign corporation, may be brought in any court of the United States where the defendant may be found at the time of the service of the writ; and where a firm in this country is the financial agent of a foreign corporation, and the office of the firm is the office of the corporation for the transaction of its business in this country, the service of subpoena upon the head of the firm as the general agent of the foreign corporation is a sufficient service of process upon such corporation.¹

§ 92. Same — Suits arising under patent-right laws of the United States.—The provisions of the general judiciary act now in force, prescribing the district in which suits shall be brought, apply only to those classes of suits of which the circuit courts of the United States have original cognizance, concurrent with the courts of the several states, and do not apply to suits of which the courts of the United States have exclusive jurisdiction; and the circuit courts of the United States have exclusive jurisdiction of all suits arising under the patent-right and copyright laws of the United States, and such suits may be brought in any district where personal service can be had upon the defendant;² and it seems to be a rule well established that where exclusive jurisdiction of any case or any class of cases is vested in the circuit courts of the United States by special acts of congress, passed prior to the acts of March 3, 1887, and August 13, 1888, the territorial jurisdiction of such suits so within the exclusive jurisdiction of the United States circuit courts is not affected by the last-named acts limiting the place of bringing suit to the district whereof one of the parties is an inhabitant, but such suits may be brought wherever valid service can be had upon the defendant.³

¹ Re Hohorst, 150 U. S. 653-664; Barrow Steam Ship Co. v. Kane, 170 U. S. 100, 113.

² U. S. R. S., sec. 711; Re Hohorst, 150 U. S. 653-664; Re Keasby & Mattison Co., 160 U. S. 221-231; Smith v. Sargent Mfg. Co., 67 Fed. R.

801; Van Patten v. Chicago, M. & St. P. R. Co., 74 Fed. R. 981; Earle v. Southern Pac. Co., 75 Fed. R. 609; 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

³ Re Hohorst, 150 U. S. 653-664; Re

But the territorial jurisdiction of suits for the infringement of letters-patent is now regulated by a special act of congress passed March 3, 1897, which provides: "That in suits brought for the infringement of letters-patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If suit is brought in a district of which defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."¹

§ 93. Same — Suits arising under the trade-mark laws of the United States.— An act of congress of March 3, 1881, authorizes the owners of trade-marks used in commerce with foreign nations, or with the Indian tribes domiciled in the United States, or located in any foreign country, or tribes which by treaty, convention or law afford similar privileges to citizens of the United States, to procure a registration of such trade-marks in the patent office of the United States, and gives remedies by action for damages in courts of law for the wrongful use of such trade-marks at the suit of the owner, and also suits in equity to enjoin the wrongful use of such trade-marks, and vests jurisdiction of such suits in the courts of the United States, but makes no regulations concerning the territorial jurisdiction of such suits; and it has been held by the supreme court of the United States that the place of bringing suits under such act in regard to the infringement of trade-marks is controlled by the provisions of the judiciary act of March 3, 1887 (as amended by act of August 13, 1888), requiring that suit shall be brought in the district whereof one of the parties is an inhabitant.²

Keasby & Mattison Co., 160 U. S. 221-231; Smith v. Sargent Mfg. Co., 67 Fed. R. 801; Van Patten v. Chicago, M. & St. P. R. Co., 74 Fed. R. 981; Earle v. Southern Pacific Co., 75 Fed. R. 609; United States v. Mooney, 116 U. S. 104-108.
¹ 29 U. S. Stat. at L., ch. 395, p. 695.
² 21 U. S. Stat. at L., ch. 138, p. 502; Re Keasby & Mattison Co., 160 U. S. 221-231.

§ 94. Same—Suits under laws of the United States to protect commerce.—Suits prosecuted under an “act to protect trade and commerce against unlawful restraints and monopolies” may be brought in the district in which the defendant resides or is found; and when it shall appear to the court before which any proceeding in equity, under section 4 of that act, may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause such other parties to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.¹ And proceedings in equity in the circuit courts of the United States under the sixteenth section of “an act to regulate commerce,” approved February 4, 1887, may be prosecuted in the judicial district in which the common carrier complained of has his principal office, or in which the violation of the provisions of said act shall occur, and notice of such proceedings shall be served upon the defendant, his officers or agents, or servants, in such manner as the court may direct.²

§ 95. Same—Persons suing or sued in a representative capacity.—When the jurisdiction of the court is based upon the diverse citizenship of the parties, if one of the parties sues or is sued in a representative capacity, as receiver, trustee, executor or administrator, and such suit is maintainable by or against such party so suing or sued in his representative capacity, without joining as parties the persons beneficially interested, the jurisdiction is to be determined by the citizenship of the party so suing or sued in a representative capacity, and not by the citizenship of the person represented or ultimately beneficially interested in the subject-matter of the suit.³ In the case of *Dodge v. Tulleys*, Justice Brewer, speaking for the supreme court of the United States, said: “Another defect claimed is that the citizenship of Hesse, the obligee in the bond, is not

¹ 26 U. S. Stat. at L., ch. 649, pp. 211, 212.

² 24 U. S. Stat. at L., ch. 104, sec. 16, pp. 384, 385.

³ *Rice v. Houston*, 13 Wall. 66; *Bradford v. Williams*, 3 How. 576; *Dodge v. Tulleys*, 144 U. S. 451; *Coal*

Co. v. Blatchford, 11 Wall. 172; *Harper v. Norfolk & W. R. Co.*, 36 Fed. R. 102; *Shirk v. City of La Fayette*, 52 Fed. R. 857; *Davies v. Lathrop*, 13 Fed. R. 358; *Browne v. Browne*, 1 Wash. 429, Fed. Cas. No. 2,035.

alleged; but this is unnecessary. The suit is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was, therefore, the proper party in whose name to bring suit for foreclosure. It happens in this case that there was but one party beneficiary under the trust deed; but it often is the case, as in railroad trust deeds, that the beneficiaries are many. But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that the beneficiary in a trust deed may be a citizen of the same state as the grantor would not, if the trustee is a citizen of a different state, defeat the jurisdiction of the federal court.”¹

§ 96. Local suits under section 8, act of March 3, 1875.—All suits in the circuit courts of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property must be brought in the district in which the property is situated; and when a part of such property shall be within two districts of the same state, the suit may be brought in the circuit court of either of such districts; and if one or more of the defendants in such suit shall not be an inhabitant of or found within the district where such suit shall be brought, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of the property which is the subject of the suit, if any there be; or when such personal service is not practicable, such order shall be published, in such manner as the court may direct, not less than once a week for six consecutive weeks. Suits of this character, and the place of bringing them, and the manner of substituted service upon absent defendants, are authorized, regulated and controlled by section 8 of the act of March 3, 1875, which was expressly continued in force by the act of March 3, 1887 (as corrected by act of August 13, 1888); and the provisions of the last-named act, requiring that suits shall be brought either in the district

¹ 144 U. S. 451-458.

of the residence of the plaintiff or the defendant, are inapplicable to suits of this character, or other suits of a local nature. The rule prescribed by the former act in regard to the district where suits of the nature and character therein enumerated shall be brought constitutes a distinct and important exception to the general rule prescribed by the last-named statute, requiring all civil suits to be brought in the district whereof the defendant is an inhabitant; and although the jurisdiction of the court in any suit mentioned in section 8 of the act of March 3, 1875, may be founded only on the fact that the action is between citizens of different states, yet the law does not require that such suit should be brought in the district of the residence of either the plaintiff or defendant; the situs of the property fixes the place or district where the suit shall be brought, and if the requisite diverse citizenship exists, the court where the property is situated has jurisdiction of the suit, although neither the plaintiff nor the defendant reside in such district.¹ The supreme court of the United States has sustained the validity of section 8 of the act of March 3, 1875, and has upheld the jurisdiction of the court conferred in such cases by publication to the absent defendants;² and that court has expressly held that the right given by section 8 of the act of 1875 to the plaintiff in local actions to call in by publication absent defendants who have an interest in the subject-matter of the litigation was not taken away nor in any manner affected by the act of March 3, 1877 (as corrected by the act of August 13, 1888), where the requisite diverse citizenship exists.³

§ 97. Where ancillary or dependent suits are to be brought.

The statutes of the United States prescribing where suits shall be brought do not apply to ancillary or dependent suits, but such suits should be brought in the same court where the original suit to which it is ancillary or upon which it is dependent was brought, without regard to the citizenship of the parties,

¹ 18 U. S. Stat. at L., ch. 137, sec. 8, p. 477; 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 437; *Greeley v. Lowe*, 155 U. S. 58-76; *Mellen, Trustee, v. Moline Malleable Iron Works*, 131 U. S. 352-371; *Arndt v. Griggs*, 134

U. S. 316-329; *Goodman v. Niblack*, 102 U. S. 556; *Single v. Scott Paper Mfg. Co.*, 55 Fed. R. 553.

² *Mellen, Trustee, v. Moline Malleable Iron Works*, 131 U. S. 352-371; *Arndt v. Griggs*, 134 U. S. 316.

³ *Greeley v. Lowe*, 155 U. S. 58-76.

or any other ground of jurisdiction, and the subpoena may lawfully be served upon the defendant wherever found, whether in or out of the district where the ancillary suit is brought; in ancillary suits the court has jurisdiction over the defendant by virtue of the jurisdiction acquired over him in the former or original suit. An ancillary suit is not a suit "by original process or proceeding."¹ It is not within the purview of this chapter to discuss the subject of ancillary jurisdiction, but it is deemed that it would be quite convenient to the practitioner to state in this connection some of the general principles in regard to the basis of this branch of the jurisdiction, and also some of the general features and purposes of ancillary suits, as well as the necessity for the existence of the ancillary jurisdiction as developed in the cases cited below. Mr. Justice Miller of the United States supreme court, discussing the ancillary jurisdiction, said: "The question is not whether the proceeding is supplementary and ancillary or is independent and original in the sense of the rules of equity pleading, but whether it is supplementary and ancillary or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from those of the state. No one would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of

¹ *Hatch v. Dorr*, 4 McLean, 112, Fed. Cas. No. 6,006; *Babcock v. Millard*, Fed. Cas. No. 699; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164; *Milwaukee, etc. R. Co. v. Soutter*, 2 Wall. 609, 645; *The Cortes Co. v. Tannhauser*, 9 Fed. R. 226; *Bank v. Leland*, Fed. Cas. No. 9,452; *Jones v. Andrews*, 10 Wall. 327; *Clark v. Mathewson*, 12 Pet. 164; *Freeman v. Howe*, 24 How. 450; *In re Sabine*, Fed.

Cas. No. 12,195; *Root v. Woolworth*, 150 U. S. 401; *Thompson v. McReynolds*, 29 Fed. R. 657; *Lamb v. Ewing*, 54 Fed. R. 272, 273; *Dietzsch v. Huidekoper*, 103 U. S. 494; *White v. Ewing, Receiver*, 159 U. S. 36-40; *Pacific Railroad of Missouri v. Missouri Pacific R. Co.*, 111 U. S. 505; *Gumble v. Pitken*, 124 U. S. 131; *Compton v. Jessup*, 68 Fed. R. 263; *Blake v. Iron & Coal Co.*, 76 Fed. R. 624.

another state, if he were a party to the judgment at law.”¹ It would seem that the prevention of a conflict of authority between the state and federal courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest; or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest; or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding; or to obtain any equitable relief in regard to, or connected with, or growing out of any judgment or proceeding at law rendered in the same court; or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court,—is an ancillary suit.²

§ 98. The right to be sued in a particular district waived by general appearance.—In a case where the court has jurisdiction the right to be sued in a particular district is a personal privilege of the defendant and may be waived by a general appearance. Where the parties are citizens of different states, so that the case comes within the general grant of jurisdiction contained in the first part of section 1 of the statute now in force, the defendant, by entering a general appearance in a suit brought against him in a district of which neither he nor the plaintiff is an inhabitant, waives his right to object that the suit is brought in the wrong district. When the defendant intends to urge the objection that he is sued in the wrong district he should enter a special appearance for that purpose only, and thereby avoid

¹ *Milwaukee, etc. R. Co. v. Soutter*,
2 Wall. 609-645.

² See all authorities cited above
under this section.

the waiver of his privilege by a general appearance.¹ In one of the cases cited the supreme court of the United States said: "The act of March 3, 1887, as corrected by the act of August 13, 1888, confers upon the circuit courts of the United States original jurisdiction of all civil actions, at common law or in equity, between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000; and provides that where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant. The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court of its own motion will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege which the defendant may insist upon or may waive at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection."²

¹ *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217-220; *Re Keasby & Mattison Co.*, 160 U. S. 221-231; *Dunlap v. Stetson*, 4 Mason, 360, Fed. Cas. No. 4,164; *Gracie v. Palmer*, 8 Wheat. 699; *Toland v. Sprague*, 12 Pet. 331; *Ex parte Schollenberger*, 96 U. S. 369; 24 U. S. Stat. at L., ch. 373, sec. 1, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127.

² *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217-220.

CHAPTER VI.

SUITS IN EQUITY COMMENCED BY ORIGINAL BILL.

- § 99. How suit in equity commenced.
100. The preparation of the original bill.
- (a) PARTS AND FRAME OF THE ORIGINAL BILL AS MATURED IN THE HIGH COURT OF CHANCERY OF ENGLAND.
101. Office and functions of the original bill.
102. The address of the bill.
103. Names and addresses of the plaintiffs.
104. The stating part of the bill.
105. The common confederacy clause.
106. The charging part.
107. The jurisdictional clause.
108. The interrogating clause.
109. The prayer for relief.
110. The prayer for process.
- (b) PARTS AND FRAME OF THE ORIGINAL BILL UNDER THE UNITED STATES EQUITY RULES.
111. Nature and effect of the United States equity rules.
112. What parts of the bill may be omitted.
113. Address to the court and residence of the parties.
114. The stating part and charging part of the bill partially blended.
115. The stating part and charging part of the bill not wholly blended.
116. The interrogating part of the bill.
117. Same — Interrogatories not necessary to compel full answer.
- § 118. Same — Plaintiff's right to discovery.
119. Exceptions to the rule that plaintiff is entitled to discovery.
120. The prayer for relief and for special writs and orders.
121. The prayer for the process of subpoena.
122. The bill must be signed by counsel.
123. What bills must be verified by oath.
124. How oaths are to be administered.
- (c) SOME GENERAL RULES OF PLEADING.
125. The jurisdictional facts must be averred in the bill.
126. How and when jurisdictional facts are to be averred in removal cases.
127. Every fact essential to plaintiff's right must be stated in the bill.
128. Common-law rules of pleading followed in equity pleading.
129. Same — Pleading title to real property.
130. Same — Conditions precedent must be averred in the bill.
131. Deeds, contracts and other instruments must be pleaded according to their legal effect.
132. The bill must not contain scandal nor impertinence.
133. Same — Inherent power of the court over its own records.
134. The bill must not be multifarious.

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| <p>§ 135. Same — Common point of litigation.</p> <p>136. Same — No universal rule can be laid down.</p> <p>137. Same — Bill with a double aspect.</p> <p>138. The degree of certainty required in a bill in equity.</p> <p>139. Bills by stockholders.</p> <p>(d) AMENDING THE ORIGINAL BILL.</p> <p>140. The original and amended bills are one record.</p> <p>141. The general purposes of amendments.</p> <p>142. The federal statute of amendments and jeofails.</p> <p>143. Same — Time within which amendments may be allowed.</p> | <p>§ 144. Amendments of course before demurrer, plea or answer filed.</p> <p>145. Amendments after demurrer, plea or answer filed.</p> <p>146. Amendments after demurrer or plea allowed.</p> <p>147. Amendment after replication filed.</p> <p>148. Same — Form of averment in bill stating pretense of defendant.</p> <p>149. Amendments to put in issue new matter contained in defendant's plea or answer.</p> <p>150. What matter may be introduced by amendment.</p> <p>151. Amendment as to parties.</p> <p>152. When application for amending bills may be presented.</p> <p>153. How amendments are made.</p> |
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§ 99. **How suit in equity commenced.**— A suit in equity in the circuit courts of the United States is commenced by the filing of an original bill in the clerk's office, and the issuance thereon of a subpoena, and its service upon the defendant and return. An equity rule provides that "the process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill;"¹ and another equity rule provides that "no process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office;"² and by another equity rule it is provided that, "upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."³ Under these rules, which have the force of law, there is no suit "pending in the court" until the subpoena has been actually served and executed upon the defendant and returned to the clerk's office; and this was substantially the English practice. It is said that "this writ" (the subpoena) "must be issued and served upon all the parties defendant to a bill (except the attorney-general, who being an officer of the crown, always sup-

¹ Equity Rule 7.² Equity Rule 9.³ Equity Rule 16.

posed to be present in court, is, as we have seen, merely attended with a copy of the bill), before a cause can be properly said to be commenced.”¹

§ 100. The preparation of the original bill.—Great care, attention and professional skill are requisite in the preparation and draft of the original bill. A mistake in the statement of the facts which constitute the equities of the plaintiff's case, or a failure to properly adapt the scope and theory of the bill to the attainment of the appropriate discovery and relief, may, and often does, embarrass the suit from its inception to its final determination, necessitating amendments and causing vexatious delays, and sometimes resulting in the complete sacrifice of the plaintiff's rights.² In so far as such an end is attainable, the equity rules and the decided cases of the United States courts have simplified pleadings and proceedings in equity causes; but by reason of the very nature and purposes of the remedy by original bill, and the character of the injuries which that remedy is usually invoked to redress, pleadings in equity are necessarily attended with intricacies and difficulties which require technical and professional skill and learning to master and overcome. A distinguished jurist and author has said: “Equity pleading has, indeed, now become a science of great complexity, and a very refined species of logic, which it requires great talents to master in all its various distinctions and subtle contrivances, and to apply it, with sound discretion and judgment, to all the diversities of professional practice. The ability to understand what is the appropriate remedy and relief for the case; to shape the bill fully, accurately and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details; and to decide who are the proper and necessary parties,—the ability to do all this requires various talents, long experience, vast learning, and a clearness and acuteness of perception which belong only to very gifted minds. Without these, diligence and industry will not always insure success; although it may be truly said, that, without the latter also, genius, however high, will find itself outstripped in the race, and be compelled to pay homage to inferior minds,

¹ 1 Daniell, 554.

² *Shields v. Barrow*, 17 How. 130.

who may win an easy triumph by steady perseverance against the bold but irregular sallies of less wary adversaries.”¹

This chapter will be devoted to a discussion and analysis of the principles and elements of the original bill, and the rules to be observed in its draft and preparation, and also the subject of amendments to the bill. Although the draft of the bill is now to a large extent regulated by the equity rules, yet the force and effect of these rules cannot be fully appreciated and comprehended without a knowledge of the functions and parts of an original bill as it was developed and matured in the High Court of Chancery of England. The United States circuit courts administer equitable remedies in accordance with the English system as modified by the equity rules,² and these rules must be construed with reference to their setting, and that system. Then, therefore, the order to be here pursued is: (1) the parts and frame of an original bill as matured in the High Court of Chancery of England; (2) the parts and frame of an original bill under our equity rules; (3) some general rules to be observed in drawing original bills; and (4) amendments to original bills.

(a) PARTS AND FRAME OF THE ORIGINAL BILL AS MATURED IN THE HIGH COURT OF CHANCERY OF ENGLAND.

§ 101. Office and functions of the original bill.—Disregarding all matters of form, and looking alone to the substantive character, essential elements and primary objects and purposes of the original bill, its functions are only four in number, viz.: (1) To state in legal form all of the essential ultimate facts which constitute the equity of the plaintiff, and upon which he rests his claim to relief; (2) to anticipate and state the facts or pretended facts which defendant will set up as a defense to the case made by the bill, and to avoid such defense by the statement of other facts; (3) to obtain from defendant a discovery and admission of facts which support and prove, or tend to support and prove, the case of the plaintiff made in the bill; and (4) to state the relief sought by the bill.³

¹ Story's Eq. Pl., sec. 13.

² Equity Rule 90.

³ Langdell, Eq. Pl., sec. 55; *McClaskey v. Barr*, 40 Fed. R. 559;

Redesdale (6th Am. ed.), 50; 1 Daniel, 484, 485; Story's Eq. Pl., sec. 31; Adams' Eq. 303; *Mechanics' Bank v. Levy*, 3 Paige Ch. 606; *Stafford v.*

As will be shown in the following sections, the English bill had, or might have, nine formal parts, but the real substance of the bill is as here stated.

§ 102. The address of the bill.—For the sake of convenience and order, bills are drawn with some regard to form. The first part of the bill is its direction or address to the court. In the English practice every bill was addressed to the person or persons who had the actual custody of the great seal at the time the bill was filed, unless the seal was in the king's own hand, or the lord chancellor was the suitor, in which cases the bill was addressed to the king in his High Court of Chancery.¹

§ 103. Names and addresses of the plaintiffs.—The second part of the bill, in the English practice, correctly stated the names of all the plaintiffs, and also gave a description of the place of abode or residence of each plaintiff, in order that the court and the defendants might know where to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against the plaintiff, or to punish any improper conduct in the course of the suit.²

§ 104. The stating part of the bill.—The third part of the bill is called the stating part; it contains a statement of the plaintiff's case. This part of the bill should contain a full, accurate, clear and distinct statement of all the essential ultimate facts which constitute the plaintiff's case, and upon which he rests his claim to relief. It must contain such a statement of facts as would, if admitted by the answer of defendant or established by the proof at the hearing, entitle the plaintiff to a decree of the court granting him relief.³ "The complainant's equity must appear in the stating part of the bill."⁴ "The rules of pleading require that every material averment that is nec-

Brown, 4 Paige Ch. 88, 91; Hawley v. Wolverton, 5 Paige Ch. 522, 525; Watson v. Rennick, 4 Johns. Ch. 381; Robbins v. Davis, 1 Blackf. 238, Fed. Cas. No. 11,880; Smith's Ch. Prac. 660, 666; Wigram on Discov., secs. 18, 276, 277, 278, 279, 281; Hare on Discov., sec. 5, p. 212.

¹ Redesdale (6th Am. ed.), 49; 1 Daniell, 463.

² Redesdale (6th Am. ed.), 49; 1 Daniell, 463; Story's Eq. Pl., sec. 26.

³ Redesdale (6th Am. ed.), 49; 1 Daniell, 465, 466; Story, Eq. Pl., secs. 27, 28; Adams' Equity, 302, 330.

⁴ Flint v. Rives, 3 Ves. Jr. 343.

essary to entitle the plaintiff to the relief prayed for must be contained in the stating part of the bill; and this is a useful rule for the preservation of form and order in the pleadings. This part of the bill must contain the plaintiff's case, and his title to relief; and every necessary fact must be distinctly and expressly averred, and not in a loose and indeterminate manner, to be explained by inference, or by reference to other parts of the bill."¹

§ 105. The common confederacy clause.—This is the fourth part of the bill, and "contains a general charge that the defendant, combining and confederating with divers persons, at present unknown to the plaintiff, but whose names when discovered the plaintiff craves to be at liberty to insert in his bill, with apt and proper matter and words to charge and make them parties defendant to the bill, refuses to do that justice to the plaintiff which he requires or is entitled to." It is said that the practice of inserting this clause arose from the supposition that without it the bill could not be amended by the addition of parties, and that in some cases it was necessary to sustain the jurisdiction of the court; but it was in fact never essential for either purpose. It is surplusage, and defendants cannot be compelled to answer it.²

§ 106. The charging part.—This is the fifth part of the bill, and, although so distinguished a lawyer as Lord Kenyon while at the bar never would put it in the bills drawn by him, its introduction in many cases has proved highly beneficial. This part of the bill performs two distinct offices, to wit:

First. The plaintiff may state by way of pretense any fact or pretended facts which he supposes or anticipates will be interposed by the defendant as a defense to the case made by the plaintiff in the stating part of the bill, and may deny, or explain, or confess and avoid such defense by the averment of other facts. In the early practice the original bill stated the plaintiff's case very briefly and concisely, and if the defendant's answer introduced any new matter, the plaintiff met it by filing a special replication; but special replications fell

¹ Wright v. Dame et al., 22 Pick. (Mass.) 55, 59.

² Redesdale, 43, 44; 1 Daniell, 482, 483; Story, Eq. Pl., secs. 29, 30.

into disuse, and their place was supplied by the charging part of the bill. And now the plaintiff by his pleading places on file both a bill and a special replication to the anticipated defense of the defendant; and the charge that the defendant pretends a certain fact puts that fact in issue.¹ If at the time of preparing and filing the original bill the plaintiff is unable to anticipate the defense, he may omit any reference to it until the coming in of the defendant's answer, and then avoid the defense by an amendment to the bill.²

Second. The charging part of the bill is also used for the purpose of laying the foundation for discovery from the defendant, (1) to prove plaintiff's case as made in the stating part of the bill, and (2) to counterprove and destroy the defense of the defendant as set up by way of pretense in the charging part of the bill; and the plaintiff may, in the charging part, allege any matter of evidence, or any collateral fact or circumstance, the admission of which by the defendant may be material in proving the plaintiff's case or in destroying the defendant's defense, or in ascertaining or determining the nature and extent or kind of relief to which the plaintiff may be entitled, consistently with the case made by the bill.³ "A bill in chancery is not only a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which complainant's right to relief rests, as in a declaration in a suit at law, but also, in most cases, an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the complainant's case, or to counterprove or destroy the defense which may be set up by such defendant in his answer. The complainant may therefore state any matter of evidence in the bill, or any collateral fact, the admission of which, by the defendant, may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature and extent or the kind of relief to which the complainant may be entitled,

¹ Redesdale (6th Am. ed.), 50; 1 Daniell, 484, 485; Story, Eq. Pl., sec. 31; Adams' Eq. 303.

² 1 Daniell, 513; Adams' Eq. 303; Story, Eq. Pl., secs. 676, 678, 884, 885, 878; Shields v. Barrow, 17 How. 130; Stafford v. Brown, 4 Paige, 88, 91.

³ 1 Daniell, 485; Story, Eq. Pl., secs. 31, 268; Adams' Eq. 303-305; Mechanics' Bank v. Levy et al., 3 Paige Ch. 606; Stafford v. Brown, 4 Paige, 88-91; Hawley v. Wolverton, 5 Paige Ch. 522-525; Langdell, Eq. Pl., sec. 57.

consistently with the case made by the bill, or which may legally influence the court in determining the question of costs.”¹ It is not as a pleading proper, but as an examination of the defendant for discovery that the bill may contain a statement of evidence, collateral facts and circumstances, the admission of which by the defendant would be material in establishing the plaintiff’s case; and for this reason these matters alleged as a foundation for discovery are properly inserted in the charging part, and not in the stating part, which is or should be a pleading pure and simple.²

The charging part may also, for the purposes of discovery, contain an allegation that the defendant has in his possession or under his control books, papers and documents which are evidence to prove his bill or some part thereof, and the defendant, in his answer, must either deny that he has possession or control of any such books, papers and documents, or he must set forth what books, papers and documents he has, and describe them, and, if relevant, they thereby become a part of his answer, and are subject to the inspection and use of plaintiff, as proof in the cause.³

§ 107. The jurisdiction clause.—“The sixth part of the bill is intended to give jurisdiction over the suit to the court by a general averment that the acts complained of are contrary to equity, and tend to the injury of the plaintiffs, and that they have no remedy, or not a complete remedy, without the assistance of a court of equity.” This clause cannot give the court jurisdiction and is unnecessary, for it must appear from the facts disclosed in the bill that the court has jurisdiction of the cause.⁴

§ 108. The interrogating part.—This is the seventh part of the bill, and contains a prayer that the defendants may answer on oath all the allegations and charges of the bill according to the best and utmost of their knowledge, remembrance, infor-

¹ Opinion of Chancellor Walworth in *Hawley v. Wolverton*, *supra*.

² *Mechanics’ Bank v. Levy et al.*, 3 Paige, 606; *Hawley v. Wolverton*, 5 Paige, 522–525; Story, Eq. Pl., sec. 268; *Adams’ Eq.* 305.

³ *Watson v. Rennick*, 4 Johns. Ch. 381; *Robbins v. Davis*, 1 Blatchf. 238.

Fed. Cas. No. 11,880; 1 Smith’s Ch. Prac., 660–666; Wigram on Discovery, secs. 18, 276, 277, 278, 279, 281; Hare on Discovery, sec. 5, p. 212.

⁴ 1 Daniell, 486; 1 Smith’s Ch. Prac. 84; Redesdale (6th Am. ed.), 50; Story, Eq. Pl., sec. 34.

mation and belief; and it may also contain special interrogatories addressed to the defendants, which, however, must be based upon some allegation or charge of the bill; for the purpose of compelling a full answer to the bill, and of making inquiry into all the circumstances of the case. The purpose of requiring an answer from defendants is to obtain discovery and supply the proof to establish the allegations of the bill or some part thereof.¹ But special interrogatories have never been absolutely necessary in order to require an answer from defendant; it has always been the rule that a general requirement without special interrogatories is sufficient to compel a full answer and discovery.²

§ 109. The prayer for relief.—The eighth part of the bill is the prayer for relief, and is varied according to the case made by the bill, and always concludes with a prayer for general relief. It is the usual and most convenient practice to insert a special and specific prayer for the relief which the pleader thinks his client is entitled to receive, and then add a prayer for general relief at the discretion of the court.³

§ 110. The prayer for process.—The ninth part of the bill is the prayer that process may issue to compel the defendant to appear and answer the bill and abide the determination of the court upon the subject. This prayer should specify the names of the persons who are made defendants to the bill, and against whom the process is prayed; and if the writ of injunction or other extraordinary writ be desired, then, according to the English practice, it should be prayed for in both the prayer for relief and the prayer for process.⁴

(b) PARTS AND FRAME OF THE ORIGINAL BILL UNDER THE UNITED STATES EQUITY RULES.

§ 111. Nature and effect of the United States equity rules. The United States equity rules do not affect nor change the

¹ 1 Daniell, 486-489; Redesdale, Am. ed.), 54; 1 Smith's Ch. Prac. 84, 50-54; Story, Eq. Pl., sec. 35; 1 Smith's 85; Story, Eq. Pl., secs. 40-43; Adams' Ch. Prac. 84, 85. Eq. 308, 309.

² Methodist Episcopal Church v. Jacques, 1 Johns. 65; Story, Eq. Pl., sec. 35; McCaskey v. Barr, 40 Fed. R. 559. ⁴ Redesdale (6th Am. ed.), 54, 55; 1 Daniell, 500-503; Story, Eq. Pl., sec. 44; Adams' Eq. 310, 311; 1 Smith's Ch. Prac. 85, 86.

³ 1 Daniell, 489, 490; Redesdale (6th

real substantive character and essential elements of pleadings and proceedings in equity as they existed in the High Court of Chancery in England. These rules do not in the least diminish the efficiency of the remedy by bill in equity, but on the contrary they increase the efficiency of the remedy; some of these rules are simply declaratory of the ancient principles of equity pleadings and procedure; some of them are literal copies of the English chancery orders; some of them were promulgated to make plain and certain some matters of practice and procedure which had been left in doubt and uncertainty by the English decisions; and some of them have made changes in the practice and procedure to meet local conditions and the peculiar constitution of the federal courts. These rules will all be considered in their due order and proper connection.

§ 112. What parts of the bill may be omitted.—An equity rule provides that: “The plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters of excuse which the defendant is supposed to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor.”¹ It will be noted that the omissions mentioned in the rule are optional with the pleader, and that the only consequence of the omissions is that the bill shall not be demurrable therefor; but such omissions would not, as we have seen, render the bill demurrable under the English practice.

§ 113. Address to the court and residence of the parties. An equity rule provides that: “Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: To the judges of the circuit court of the United States for the district of —: A. B. of —, and a citizen of

the state of —, brings this his bill against C. D. of —, and a citizen of the state of —, and E. F. of —, and a citizen of the state of —. And thereupon your orator complains, and says that"—¹

§ 114. **The stating part and charging part of the bill partially blended.**—An equity rule provides that: "The plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief."² This is a real innovation in equity pleading, but a logical and beneficial one. That part of the charging part of a bill in equity, as matured in the High Court of Chancery of England, which anticipates and avoids the defense, is a pleading, strictly; and its transfer by the equity rule into the stating part of the bill is a natural and logical development of the equity system, and renders the bill more logical and symmetrical than it was under the old practice. Under this rule, when the plaintiff, in the stating part of his bill, states a fact or a transaction as a foundation for relief, he may, in connection therewith, state and avoid any pretense which he supposes or anticipates the defendant will set up in relation to the fact or transaction so stated. In this manner, the logical and chronological order of all the statements of the bill as a pleading may be preserved, and the real cause of the complaint be more easily understood by the court.

§ 115. **Stating part and charging part of the bill not wholly blended.**—We have seen that, in the charging part of the original bill as matured in the High Court of Chancery of England, the plaintiff may, for purposes of discovery, state any matter of evidence, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of his bill, or in ascertaining or determining the nature, extent or kind of relief to which the plaintiff may be entitled, consistently with the case made by the bill; and that for a like purpose the plaintiff may state in the charging part of his bill that the defendant has in his possession or

¹ Equity Rule 20.

² Equity Rule 21.

under his control books, papers and documents which contain proof of the allegations of the bill or some of them, and that defendant is bound to answer such charges of evidence. But there is no equity rule which abolishes this feature of the bill, or authorizes these matters to be charged in the stating part of the bill; and it is therefore still proper, in the equity practice in the United States circuit courts, to insert in the bill, in a separate clause, charges of evidence, collateral facts and circumstances, and the possession or control, by defendant, of books, papers and documents, the admission of which may be material in establishing the plaintiff's case.¹

§ 116. The interrogating part of the bill.—The very full and elaborate regulations in regard to the interrogating part of the bill contained in the United States equity rules show the purpose of the United States supreme court to preserve in all its efficiency the functions and agency of the bill as a means of discovery; but, as under the English practice, it is now left optional with the pleader to propound interrogatories or to omit them.

An equity rule provides that: "It shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain discovery."²

Another equity rule provides that the words preceding the interrogating part shall be: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."³

And another equity rule provides that: "(1) The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and num-

¹ See *ante*, § 106.

² Equity Rule 40.

³ Equity Rule 43.

bered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc.;' and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished a copy of the whole bill.

"(2) If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of congress of July 2, 1864."¹

And another equity rule provides that: "The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill."²

§ 117. Same — Interrogatories not necessary to compel full answer.— It is the duty of the defendant to answer fully all the allegations and charges contained in the bill, without special interrogatories; this was the rule in the English practice,³ and is expressly declared by one of the equity rules above quoted.⁴ In the opinion of Chancellor Kent in one of the cases cited,⁵ in a discussion of the English practice it is said: "The

¹ Equity Rule 41.

² Equity Rule 42.

³ Story, Eq. Pl., sec. 35; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 65.

⁴ Equity Rule 40; *McCaskey v. Barr*, 40 Fed. R. 559; *Brown v. Pierce*, 17 Wall. 211.

⁵ *Methodist Episcopal Church v. Jaques*, *supra*.

mere objection to a further discovery is that the bill contains no special interrogatories. The bill contains the general interrogatory 'that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated, paragraph by paragraph, with sums, dates and attendant circumstances and incidental transactions.' The question, then, is whether this be not sufficient to call for a full and frank disclosure of the whole subject-matter of the bill; and I apprehend the rule on this subject to be that it is sufficient to make the general requisition on the defendant to answer the contents of the bill; and the interrogating part of the bill, by a repetition of the several matters, is not necessary. The defendant is bound to deny or admit all the facts stated in the bill, with all the material circumstances, without special interrogatories for the purpose. They are only useful to probe more effectually the conscience of the party, and to prevent evasion or omission as to circumstances which may be deemed important; but it is no excuse for the defendant, in avoiding to answer fully to the subject-matter of the bill, that there were no special interrogatories applicable to the case. Plain sense and a good conscience will without any difficulty, in most cases, teach a defendant how far it is requisite to answer the contents of the bill, and to meet the gravamen alleged; and it is certainly desirable to avoid, if possible, the expense and prolixity of repeating, in the same bill, every material fact. It is well understood that if the defendant be specially interrogated, it can only be to the facts alleged and charged in the bill. The one cannot be more extensive than the other."

§ 118. Plaintiff's right to discovery.—Bills in equity are (1) technical bills of discovery, or bills for discovery only; and (2) bills for discovery and relief. When the plaintiff files his bill for relief, he is entitled to have and obtain from the defendant discovery to prove his bill and to disprove the defense made to the bill by the defendant. "Every bill is in reality a bill of discovery" The discovery is furnished in the defendant's answer, and is sought either in aid of proof to be made by the examination of witnesses, or to supply the want of such proof; if the answer contains full admission of the case made

by the bill, then there is no need of further proof.¹ "Evidence procured from admissions in the answer is generally less expensive, and often more convenient, than if it were obtained from witnesses; and it has the further advantage of being conclusive — that is, of acting as an estoppel to the introduction of conflicting testimony."² Mr. Wigram, in his work "Points in the Law of Discovery," in a masterful analysis of the English chancery decisions upon the subject, establishes the two following fundamental propositions in regard to the plaintiff's right to discovery, viz.:

"Proposition I. It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not by his form of pleading admit.

"Proposition II. Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defense. With this (if a) qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence."³

And in the same work the author establishes the following subsidiary propositions, viz.:

First. "That (1) where a plaintiff makes a case in his bill, which, if admitted, would disprove the truth of, or otherwise invalidate, the defense made to the bill, he is entitled to a discovery from the defendant, in order to enable him so to impeach the defendant's case; (2) so far, then, the plaintiff has a right to discovery directed, as evidence, not to the case upon which his right to a decree is founded, but to the purpose of attack upon the defendant's case; (3) that the right of a plaintiff to discovery in support of his own case is not abridged, as to any particular discovery, by the consideration that the matter of such particular discovery may be evidence of the defendant's case *in common* with that of the plaintiff."⁴

¹ Wigram on Law of Discovery, 1-6; *Hawley v. Wolverton*, 5 Paige, 523; *Mechanics' Bank v. Levy*, 3 Paige, 606; *Story's Eq. Pl.*, sec. 268.

² *Gresley's Eq. Ev.* 9, 10.

³ Wigram on Law of Discovery, 10.

⁴ Wigram on Law of Discovery, 41.

Second. "The discovery which a court of equity compels is not confined to a discovery of facts resting merely in the knowledge of the defendant, but extends to a discovery of deeds, papers and writings of every description in his possession or power, the contents of which are material to the proof of the plaintiff's case. The plaintiff has the right in such case to require the defendant to set out the contents of such matters in his answer according to their purport and effect; or, if he pleases, in the very words and figures thereof; and such appears to have been anciently the practice in pleading. The great and unnecessary expense of this mode of pleading has led to a cheaper and more simple mode of accomplishing the same object in practice. The way is this: the plaintiff alleges in his bill (in effect) that the defendant has in his possession or power deeds, papers and writings relating to the matters mentioned in the bill; and that, by the contents of such deeds, papers and writings, if the same were produced, the truth of the plaintiff's case would appear. The defendant is then required by the bill to admit or deny the truth of these allegations; and, if he admits having possession or control over any such deeds, documents or writings, he is required by the bill, and is *prima facie* bound, to describe them either in the body of his answer or in a schedule to it. The plaintiff then moves the court that the defendant may be ordered to produce and leave in the hands of his clerk in court the deeds, papers and writings so described, with liberty for the plaintiff to inspect and take copies of them. The plaintiff being entitled to the production of these documents for the purposes of evidence only, if the defendant is advised that the plaintiff is not entitled to have them produced for such purpose, or if, for any other reason, he disputes the plaintiff's right to see the documents at that stage of the cause, he may appear upon the motion and take the opinion of the court upon the plaintiff's right to the order he seeks. This mode of getting at the defendant's documents is, then, merely a substitution of one form of practice for another — a substitution which cannot affect the principle upon which the order is made. This principle (founded upon the more ancient practice before explained) is that the documents are part of the defendant's examination. The motion for the production of the documents is in the nature of an exception to the answer, and the judgment of the

court upon the motion will be regulated accordingly. If the plaintiff under the old practice would have succeeded upon exceptions to the answer for not setting out the documents, he will be entitled upon his motion to an order to have them produced; otherwise he will not be so entitled.”¹ The author then shows from the decisions that, when the court orders the production of deeds, papers, documents and writings, it proceeds on the principle that those deeds, papers, documents and writings are, by reference, incorporated in the answer, and become a part of it; and being in the office, the effect is the same as if they were stated *in hæc verba* in the answer.²

The waiver by plaintiff in his bill, under equity rule 41, of an answer on oath is not a waiver of his right to a full answer and full discovery from the defendant. The only change made in the practice of the High Court of Chancery of England by the provision of our equity rule allowing a waiver of an answer on oath is to deprive the answer of any force as evidence in favor of the defendant. The language of the rule is: “If the complainant in his bill shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, *shall not be evidence in his favor*, unless the cause shall be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit with the same effect as heretofore on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of congress of July 2, 1864.” The admissions of a defendant in his answer of any of the facts which go to prove the bill are evidence in the plaintiff’s favor, whether the answer be sworn to or not, and the plaintiff may always avail himself of any admissions and allegations in the answer of defendant, though that answer be not under oath. Equity rule 41 does not provide that where answer under oath is waived in the bill the answer shall not be evidence for any purpose; but the provision of the rule is that under the circumstances therein stated

¹ Wigram on Law of Discovery, 6, 7.

² Wigram on Law of Discovery, 8, 9.

the answer shall not be evidence in the defendant's favor. Manifestly the admissions of the answer, however, may be used by the plaintiff in support of his bill. The federal courts have repeatedly held that a corporation, although answering under its common seal, may be required to answer fully every material allegation of the bill. Whether the oath is dispensed with by law, as in the case of corporations, or by the plaintiff, is immaterial. The two classes of answers belong to the same category in this respect, and no distinction need be made in considering the plaintiff's right to discovery. Corporations answer under the sanctity and solemnity of their seals only; but whether defendants answer under oath or under corporate seals, when oaths are waived they are required to answer fully on every material issue. The waiver of an oath in any case is made by the plaintiff for the purpose of depriving the defendant of the advantage of his answer as evidence in his own favor. If no such waiver is made, a sworn answer is taken as evidence in favor of the defendant, so forceful as to require two witnesses, or one witness and corroborating circumstances, to overcome it. From this it appears that the sole purpose of a waiver of an oath to an answer is to affect the evidential character and value of the answer. It has nothing to do with the answer as a pleading, and the rule prevails that the defendant must answer fairly and fully to each and every material fact alleged in the bill. This full and fair answer should serve the purpose of eliminating many undisputed facts from the case. If facts alleged by the plaintiff are admitted by the defendant in his answer, the necessity for consumption of time and expenditure of money in taking proof thereof does not exist, and the court's attention is drawn to the debatable issues only. The power of the court to require such an answer ought not to be abridged at all; and therefore, if the plaintiff, for the purpose of preventing the defendant from making his answer equal in evidential strength to two witnesses, sees fit to waive the oath to the answer, the right to except for insufficiency must still exist.¹ The state

¹ *Whittemore v. Patton*, 81 Fed. R. 527; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. R. 26; *Uhlmann v. Arnold & Schaeffer Brewing Co.*, 41 Fed. R. 369; *Gamewell Fire-Alarm Tel. Co. v. The Mayor*, 31 Fed. R. 312; *Colgate v. Campagnie*, 23 Fed. R. 82; *Reed v. Cumberland Mut. Ins. Co.*, 36 N. J. Eq. 393; *Patterson v. Gaines*, 6 How. 588;

and federal statutes permitting parties to be called as witnesses and examined by the opposite party have not abrogated nor curtailed the power of courts of equity to enforce discovery according to equitable principles. It is true that the right to a discovery in courts of equity arose from the necessity of searching the conscience of the opposing party in order to ascertain facts and obtain documents within his knowledge and control which the plaintiff could not reach at law because of his inability to compel the examination of the defendant under oath. It is true that the federal and state statutes now in force which enable the plaintiff to obtain such an examination have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Every bill for relief exhibited in a court of equity is, in effect, a bill for discovery, because it asks or may ask from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery, and the right of a party to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title or to apply an equitable remedy.¹ The power of a federal court of equity to entertain a cross-bill for discovery in a suit in equity has not been abridged by any act of congress or rule of the supreme court, and is not superseded by statutory methods provided for obtaining facts in actions at law; and it is not a sufficient reason for a corporation to refuse to answer a cross-bill against it for discovery that its officers and employees are made competent witnesses for either party by federal statutes, such testimony not being the exact equivalent of a discovery by the corporation itself. A corporation aggregate is bound to answer a bill of discovery the same as a natural person, except that it puts in its answer under its corporate seal, while a natural person makes answer under oath. While it is the usual practice to join the clerk or other principal officer of a corporation ag-

Union Bank v. Gary, 5 Pet. 99; Kitt- & M. 244, Fed. Cas. No. 7,859; Bartlett
ridge v. Claremont Bank, 1 Woodb. v. Gale, 4 Paige, 503.

¹ Kelley v. Boettcher, 85 Fed. R. 55.

gregate as a party to the suit in a bill for discovery, such joinder is not necessary. Where a corporation is the sole party defendant, it is its duty, if required to do so by the bill, to put in a full, true and complete answer; and to enable it to do so it must cause diligent examination to be made of all deeds, papers, writings and muniments in its possession before answering.¹

There are some decisions of the court of chancery of New York which have been relied upon as authority to sustain the general proposition that a waiver by the plaintiff of an answer on oath is also a waiver of his right to discovery;² but these decisions³ of the court of chancery of New York were governed absolutely by a special rule of that court, which is materially different in its provisions from the United States equity rule⁴ upon the point, and are therefore of no authority in the federal courts. The fortieth of the New York chancery rules, on which these decisions were based, is as follows: "If the complainant waives the necessity of the answer being made on the oath of defendant, it must be distinctly stated in the bill. When the answer is put in without oath, it may be excepted to for scandal or impertinence; but the complainant shall not be at liberty to except thereto for insufficiency. But all material allegations in the bill which are not answered and admitted may be proved by him in the same manner as if they were distinctly put in issue by the answer; and if no replication is filed, the matters of defense set up in the defendant's answer will, on the hearing, be considered as admitted by the complainant, although the answer is not on oath." Exception to an answer for insufficiency is the only means by which the plaintiff can enforce discovery, and such exception being denied by the above rule in cases where the bill waives an answer on oath, the rule was properly construed to mean that a waiver of an answer on oath should be, in that court, a waiver of the right to discovery; but the New York decisions on that rule can have no persuasive effect in the federal courts, where the rule is entirely different in its provisions. But even under that rule Chancellor Walworth held that the admissions in an answer

¹ Indianapolis Gas Co. v. City of Indianapolis, 90 Fed. R. 196.

² Uhlmann v. Arnholt & Schaeffer Brewing Co., 41 Fed. R. 369.

³ Fish v. Miller, 5 Paige, 26; McCormick v. Chamberlin, 11 Paige, 545;

Carpenter v. Benson, 4 Sandf. 496.

⁴ Equity Rule 41.

not on oath are evidence for the plaintiff.¹ In that case he said: "The defendants' counsel is wrong in supposing that the whole answer must be taken together as evidence, and that the complainant cannot avail himself of the admissions in one part of it, without being also bound by the statements and allegations in other parts of the same answer. This is not so, even where the complainant calls for an answer on oath, except as to those parts of it which are responsive to the bill. But where an answer on oath is waived, although as a pleading the complainant may avail himself of admissions and allegations in the answer which go to establish the case made by the bill, such answer is not evidence in favor of the defendant for any purpose."

In order to compel discovery from the defendant it is not necessary that the bill should contain specific interrogatories; if the bill contain a general requirement that the defendant shall answer its allegations and charges with their attendant circumstances, that will be sufficient.² "But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add, to the general requisition that the defendant should answer the contents of the bill, a repetition, by way of interrogatories, of the matters most essential to be answered; adding to the inquiry after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion and compel a full answer."³ But the defendant is not bound to answer an interrogatory unless the same is founded upon some allegation or charge in the bill; it is sufficient, however, if the interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main charges.⁴ A variety of questions may be founded on a single charge if they are relevant.⁵

The production of deeds, papers, writings, books of account and other documents is discovery. When the court orders deeds, papers and writings to be produced, it proceeds upon the

¹ Bartlett v. Gale, 4 Paige, 505.

² Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 65.

³ 1 Daniell, 487.

⁴ Mechanics' Bank v. Levy, 3 Paige, 606; 1 Daniell, 488; 1 Smith's Chan. Prac. 84, 85.

⁵ 1 Daniell, 487.

principle that such documents are, by reference, incorporated in the answer of defendant, and are a part of it, as fully as if they were stated *in hæc verba* in the answer. "It is evident, therefore, that the question of production is entirely a question of discovery, for the right of the plaintiff to discovery must be the same, whether the subject has been committed to writing or is to be drawn from the recollection of the defendant."¹ Courts of equity possess no inquisitorial power. "The power which the court possesses to compel discovery and administer relief is manifestly distinguished by the circumstance that in the former case the court is entirely dependent, in the first instance, upon the oath of the party. The court neither asserts, nor has the means of exercising, any inquisitorial jurisdiction beyond the appeal to the conscience of the defendant, and the legal sanction opposed to a deviation from the truth. It is a general rule that the defendant may be compelled to confess or deny upon oath his knowledge of every circumstance alleged by the plaintiff concerning the matter in question, and to state what papers and writings are in his possession relating to it. The court can do no more than compel an answer. If the defendant denies the circumstances which are charged, or that he is in possession of any writings relating to the subject, that denial is necessarily conclusive upon the question of discovery, and the plaintiff must be left to prove his case by such evidence as he can adduce. There may be reason to suspect that the defendant has not made a full disclosure, but the court has no power to investigate that question."² To entitle the plaintiff, before the hearing or publication, or issue joined, to call for the inspection of deeds, paper, writings, books or documents, it is not sufficient that there has been a general reference to them in the answer. They must be described with reasonable certainty in the answer, or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer, which must admit them to be in the possession or power of the defendant; and it must appear that the plaintiff has an interest in the production of the deeds, papers, writings, books or instruments sought after.³ Before the plaintiff can success-

¹ Hare on Discovery (2d Am. ed.), 228, 229; Wigram on the Law of Discovery, 93.

² Hare on Discovery (2d Am. ed.), ³ Watson v. Renwick, 4 Johns. Ch. 381.

fully move for the production of deeds, writings and documents, the following prerequisites must exist and be complied with, namely: (1) The plaintiff must allege in his bill that the defendant has in his possession or power, deeds, papers and writings relating to the matters mentioned in the bill; and that by the contents of such deeds, papers and writings, if the same were produced, the truth of the plaintiff's case would appear. In other words, the plaintiff must allege in his bill the existence of such documents, and that they are relevant testimony to prove the allegations of the bill or some of them, and that they are in the possession or under the control of the defendant. (2) The defendant must, in his answer, admit his possession of, or power over, the documents the production of which is sought. (3) The defendant must, in his answer, or in some schedule to it, describe the documents the production of which is sought. (4) The plaintiff must show from the answer of defendant that the documents are relevant testimony to prove the plaintiff's case.¹

The defendant in a suit in equity is entitled to discovery and the production of documents from his adversary, but in order to obtain such discovery he must file a cross-bill; equity gives a perfect reciprocity of proof by discovery. The broad principle upon which a cross-bill is allowed is that equity should give suitors a common advantage in its processes. As it compels a defendant to make disclosures and discoveries under oath, to aid in the suit against him, so should it secure mutuality in this privilege by allowing a defendant to become a plaintiff, and compel his adversary to make disclosures and discoveries of matters within his knowledge that are serviceable to the defense. The parties, to that end, alternate places, in order that each may have the same use of the powers of the court for the same object. A cross-bill, as its name imports, goes no farther than to give the party filing it the reciprocal right enjoyed by the plaintiff in the original bill in respect to their mutual title or interest in the subject-matter of the suit. And one of the reciprocal rights enjoyed by the defendant, and secured to him by means of a cross-bill, is dis-

¹ Wigram on the Law of Discovery, wick, 4 Johns. Ch. 381; Adams' 6, 7, 29-41; Hare on Discovery (2d Equity, 305, 306, 349, 350. Am. ed.), 228, 229; Watson v. Ren-

covery, including the production of documents.¹ Section 724 of the United States Revised Statutes is designed merely to give courts of law of the United States the power to require the production of documents to obviate the necessity of parties going into equity with a bill of discovery for that purpose in aid of an action at law, and in no way affects the practice of federal courts of equity, which is governed by the general equity rules prescribed by the supreme court, and, where they do not apply, by the practice of the High Court of Chancery of England at the time those rules were promulgated in 1842. And a federal court of equity will not compel a plaintiff to produce for inspection a deed, on which rights in real property alleged in the bill are founded, and a copy of which is attached to the bill as an exhibit, on a petition of defendant, before answering, alleging that such deed is a forgery, but, if genuine, was obtained by fraud; nor will the court enlarge the time for answering until the deed has been filed with the clerk. No litigant can be compelled, as a matter of general right, to produce his evidence for the inspection of his adversary in advance of the hearing, and the defendant is not entitled in such case to an inspection of the deed to enable him to form an opinion as to its genuineness, and thus determine which of the two inconsistent defenses he will make, but he is required to answer the bill in accordance with his knowledge and the facts.² An equity rule provides that: "Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compelled to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used."³

¹ Wigram on the Law of Discovery, 11, 12; Indianapolis Gas Co. v. City of Indianapolis, 90 Fed. R. 196; Young v. Colt, 2 Blatchf. 373, Fed. Cas. No. 18,155; Kelley v. Eckford, 5 Paige Ch. 548; Bogert v. Bogert, 2 Edw. Ch. 399; Lupton v. Johnson,

2 Johns. Ch. 429; Story's Eq. Pl., secs. 389-391; Chester Iron Co. v. Beach, 40 N. J. Eq. 63.

² Ryder v. Bateman, 93 Fed. R. 31, 43.

³ Equity Rule 72.

§ 119. **Exceptions to the rule that plaintiff is entitled to discovery.**—There are some well-established exceptions to the rule that the plaintiff is entitled to obtain from the defendant discovery of all matters of fact which are material to the proof of the case made by the bill. *First.* A defendant to a bill in equity is not compellable to give any discovery (1) which may subject him to a criminal accusation or prosecution, or to any punishment, or which may tend to convict him of any crime; or (2) which may subject him to a penalty or forfeiture, or to any loss in the nature of a forfeiture; and (3) this exemption from discovery extends not only to the main criminating facts, but to every incidental fact which might form a link in a chain of evidence, which, if perfect, would establish the defendant's liability to the criminal accusation, or prosecution, or conviction, or punishment, or penalty, or forfeiture.¹ According to the rules of the common law and the principles of the English constitution, no man is bound to accuse himself of any crime, nor to be a witness against himself, nor to furnish any evidence tending to convict himself of any crime, or to forfeit his goods for an offense against the law; and private papers are secure from unreasonable search and seizure. *Nemo tenetur seipsum accusare.*² These great principles of political liberty and personal freedom were rigorously and steadily upheld by the English High Court of Chancery, and are embodied in the fourth and fifth amendments to the federal constitution. The fourth declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fifth, among other things, declares that no person "shall be compelled in any criminal case to be a witness against himself." The supreme court of the United States, in a revenue case,³ con-

¹ Wigram on Law of Discov. 61-63; Hare on Discov. 131-156; Legget v. Postley, 2 Paige Ch. 599; Livingston v. Harris, 3 Paige Ch. 528; Taylor v. Bruen, 2 Barb. Ch. 302; Union Bank v. Barker, 3 Barb. Ch. 358; United States v. Saline Bank, 1 Pet. 100; Horshurg v. Baker, 1 Pet. 232-236; Greenleaf v. Queen, 1 Pet. 188; 2 Daniell, 45-55; Story's Eq. Pl. (10th ed.), secs. 524, 525, 575-587.

² Entick v. Carrington, 19 How. St. Tr. 1029; Emery's Case, 107 Mass. 172.

³ Boyd v. United States, 116 U. S.

struing these constitutional provisions, ruled the following points:

(1) The fifth section of the act of June 22, 1874, entitled "An act to amend the customs and revenue laws," which section authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed, *held* to be unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the fourth and fifth amendments of the constitution.

(2) Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the twelfth section of said act, *held*, that an order of the court made under said fifth section, requiring the claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority; and that the inspection of the invoice by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings.

(3) It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the fourth amendment. A compulsory production of a party's private books and papers to be used against him or his property in a criminal or penal proceeding, or for forfeiture, is within the spirit and meaning of the amendment.

(4) It is equivalent to a compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove.

(5) A proceeding to forfeit a person's goods for an offense against the law, though civil in form, and whether *in rem* or

616-641. And this case was followed in *Lees v. United States*, 150 U. S. 478-483, which was an action to recover a penalty, under the act of February 26, 1885, for importing aliens under contract to labor, the court holding that the action, though civil in form, is criminal in its nature, and in such case the defendant cannot be compelled to testify against himself.

in personam, is a criminal case within the meaning of that part of the fifth amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself."

(6) The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself; and in a prosecution for a crime, penalty or forfeiture is equally within the prohibition of the fifth amendment.

(7) Both amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the fifth amendment, namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an "unreasonable search and seizure," within the fourth amendment.

(8) Search and seizure of a man's private papers, to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property, is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law.

(9) Constitutional provisions for the security of person and property should be liberally construed.

Mr. Justice Bradley, in delivering the opinion of the court in that case, said: "The views of the first congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The fifteenth section of that act introduced a great improvement in the law of procedure. The substance of it is found in section 724 of the Revised Statutes, and the section as originally enacted is as follows, to wit: 'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under the circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts

respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.'

"The restriction of this proceeding to 'cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of proceeding in chancery' shows the wisdom of the congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."¹

From the opinion in this case it would seem that the United States supreme court holds that the law of discovery, as it had been established by the High Court of Chancery of England at the time of the passage of the original judiciary act in 1789, has been adopted in this country, and that it is in harmony with the principles of our government as embodied in the federal constitution.

Second. If a defendant has, in conscience, a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title. The most obvious case is that of a purchaser for a valu-

¹ *Boyd v. United States, supra.*

able consideration without notice of the plaintiff's claim.¹ This exception to the general rule has sometimes been construed to mean that a defendant who alleges himself to be a purchaser for value without notice of the plaintiff's claim is never required to give any discovery, and such statements are to be found in the books; but such is not the case. A defendant who sets up the defense that he is a *bona fide* purchaser for value without notice of the plaintiff's claim is bound to give the discovery necessary to try the validity and truth of the defense; that is, if the bill anticipates the defense, and sets up any facts or equitable circumstances which, if true, will avoid, displace, disprove or destroy the defense, the defendant is bound to answer as to such facts and equitable circumstances and to give full discovery in regard thereto; if the defense is made by plea, the defendant must, in an answer in support of his plea, give the discovery necessary to try the validity and truth of the plea; if the defense is made by answer, the defendant must, in his answer, give the discovery necessary to try the truth of its allegations setting up the defense.²

Third. The defendant is not compellable to discover anything immaterial to the relief prayed by the bill.³

Fourth. The defendant cannot be compelled to discover privileged communications between attorney and client.⁴

Fifth. Although a plaintiff has a right to a discovery or production of documents which tend to make out his own title affirmatively, he has no right to a discovery or production which is not immediately connected with his own title, and which forms part of his adversary's;⁵ but this rule does not deny to plaintiff the right to a discovery or production which tends to disprove the defense set up to the bill, nor will plaintiff's right to discovery be affected by the circumstance that the same documents and evidence tend to establish the defense of defendant.⁶

¹ Redesdale (6th Am. ed.), 235; 2 Daniell, 55.

² Wigram on Law of Discovery, 36-39; Equity Rule 39; Chadwick v. Broadwood, 3 Beav. 540; Story's Eq. Pl., secs. 684, 685, 687, 806.

³ 2 Daniell, 55; Redesdale (6th Am. ed.), 226; Wigram on Law of Discovery, 64-76.

⁴ 2 Daniell, 56, 61; Wigram on Law of Discovery, 62, 63.

⁵ 2 Daniell, 61-64; Wigram on Law of Discovery (Second Proposition), 90-112.

⁶ 2 Daniell, 63, 64; Wigram on Law of Discovery, 90-92.

§ 120. The prayer for relief and for special writs and orders.—An equity rule provides that: “The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.”¹ And another equity rule provides that: “If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.”² If the plaintiff desires the issuance of a preliminary writ of injunction, or any other special writ, or the appointment of a receiver, or any other special order of like character, pending the suit, he should ask for it specially in his bill; and such request should be made a part of the prayer for relief.

§ 121. The prayer for the process of subpoena.—An equity rule provides that: “The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process.”³ And another equity rule provides that: “If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.”⁴

These equity rules are declaratory of the English practice, according to which none are defendants to the bill except those against whom the process of subpoena is prayed; and care must be taken “to insert the names of all the persons who are

¹ Equity Rule 21.

² Equity Rule 23.

³ Equity Rule 23.

⁴ Equity Rule 23.

intended to be made defendants, because it has been held that the mere naming of a party in a bill, without praying process against him as a defendant, is not to be considered as making him a party, even where he is out of the jurisdiction of the court.”¹ It has been quaintly said that “the plaintiff may complain and tell stories of whom he pleases; but they only are defendants against whom process is prayed.”²

§ 122. The bill must be signed by counsel.—“Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed;”³ and if not so signed it is demurrable; but a signing on the back is sufficient;⁴ a printed name of counsel is not his signature.”⁵

§ 123. What bills must be verified by oath.—In the circuit courts of the United States, “every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath.”⁶ To a bill of interpleader it is requisite that the plaintiff should make an affidavit “that this bill is not filed in collusion with either of the defendants in the said bill named, but merely of his own accord, for relief in this honorable court.”⁷ Every application for an injunction should be supported by an affidavit of merits verifying the statements in the bill; the affidavit is usually made by the plaintiffs, or some of them, but it may be made by any person acquainted with the facts.⁸ Bills for the purpose of examining witnesses *de bene esse*, where from circumstances, such as the age or infirmity of the witnesses, or their intention of leaving the country, it is probable the plaintiff would lose the benefit of their testimony, should have

¹ 1 Daniell, 500; *Elmendorf v. De Lacy*, Hopkins’ Ch. 555.

² Lord Chancellor Parker in *Fawkes v. Pratt*, 1 P. Wms. 592.

³ Equity Rule 24.

⁴ *Dwight v. Humphreys*, 3 McLean, 104, Fed. Cas. No. 4216.

⁵ *Nightengale v. Oregon Central R. Co.*, 2 Saw. 338, Fed. Cas. No. 10,264.

⁶ Equity Rule 94.

⁷ 1 Smith’s Ch. Prac. 473, 474.

⁸ 1 Smith’s Ch. Prac. 595.

annexed to them an affidavit of the circumstances by means of which the testimony may probably be lost.¹ “The law is well settled that, where a particular allegation is inserted in a bill for the purpose of transferring the jurisdiction from a court of law to a court of equity, the bill, or rather that particular allegation in the bill, must be verified by the oath of the complainant, or by the oath of some person, on his behalf, who knows the fact.”² And so, if a bill is filed to obtain the benefit of and relief upon an instrument upon which an action at law would lie, upon the ground that it is lost and that the plaintiff cannot therefore have any relief at law, the court requires that the bill should be accompanied by an affidavit of the loss of the instrument.³ And if the plaintiff bring a bill for the discovery of deeds and writings, and for relief founded upon them, and if the relief prayed be such as might be obtained at law on the production of the deeds and writings, the plaintiff must annex to his bill an affidavit that he hath not, nor to the best of his knowledge, remembrance and belief ever had, the indenture, deed or writing, bearing date the — day of —, and made between — — and — —, and which is mentioned in his bill exhibited in the court against defendants, nor does he know where the said indenture, deed or writing now is, unless it is in the custody or power of the defendants, or one of them.⁴

§ 124. How oaths are to be administered.—Whenever, under the equity rules and practice of the courts of the United States, “an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.”⁵ The courts of the United States have power to administer all necessary oaths;⁶ and “every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony, or before any master in

¹ 1 Daniell, 507.

⁴ 1 Daniell, 504; 1 Smith's Ch. Prac.

² Alston v. Jones, 3 Barb. Ch. 392. 483.

³ 1 Daniell, 504; Livingston v. Livingston, 4 Johns. Ch. 294; Laight v. Morgan, 1 Johns. Cas. 429; Findlay v. Hinde, 1 Pet. 241.

⁵ Equity Rule 91.

⁶ U. S. R. S., sec. 725.

chancery appointed by any circuit court, or before any judge of any court of a state or territory;”¹ and notaries public are authorized to take acknowledgments and affidavits to be used in the United States courts with the same effect as commissioners of the circuit courts.²

(c) SOME GENERAL RULES OF PLEADING.

§ 125. The jurisdictional facts must be averred in the bill.

Every original bill filed in a circuit court of the United States should contain in the stating part a certain, distinct, direct and positive averment of all the facts upon which the jurisdiction of the court rests; and if it does not contain such averment it will be fatally defective, and the court upon demurrer or motion, or upon its own inspection of the bill, must dismiss the suit. The rule is inflexible and without exception that the facts upon which the jurisdiction of the courts of the United States rests must affirmatively appear in the record of all suits prosecuted before them; and the jurisdictional facts must affirmatively appear at the commencement of the suit by a statement of them in the declaration or bill of the party suing. The reason of this rule of pleading is that the jurisdiction of the courts of the United States depends alone upon the federal constitution and the acts of congress, and it is a limited jurisdiction; and there are no presumptions in favor of that jurisdiction, but every case is presumed to be without the jurisdiction of such courts, unless the contrary affirmatively appears from the record, and this presumption obtains in every stage of the cause from its inception to its conclusion; and it is the duty of all the courts of the United States, upon their own motion, to deny their own jurisdiction when it does not affirmatively appear in the record, whether a defect of jurisdiction is or is not suggested by the parties.³

¹ Equity Rule 59.

² Act Aug. 15, 1876, 19 U. S. Stat. at L., ch. 304, p. 206.

³ 18 U. S. Stat. at L., ch. 137, sec. 5, pp. 470-473; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96; *Ex parte Smith*, 94 U. S. 455; *Metcalf v. Wattertown*, 128 U. S. 586; *Bors v. Preston*, 111 U. S. 252, 263; *Mansfield, C.*

& *L. M. Ry. Co. v. Swan*, 111 U. S. 379, 389; *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U. S. 225, 227; *Hancock v. Holbrook*, 112 U. S. 231; *Taylor v. Life Ass'n*, 112 U. S. 719; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 239; *Tennessee v. Union & P. Bank*, 125 U. S. 454; *Brown v. Keene*, 8 Pet. 115; *Capron*

The act of March 3, 1887, as corrected by the act of August 3, 1888, expressly continues in force the fifth section of the act of March 3, 1875, which provides: "That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."¹

Where the jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon a question of a federal nature, it must appear, at the outset, from the declaration or bill of the party suing, that the suit is one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance; and if it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit; it cannot retain it to see whether the defendant may not raise a federal question, or set up a claim under the constitution or laws of the United States; and if the suit be so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea of defendant suggesting a federal question or setting up a claim under the constitution or laws of the United States.² In cases where the jurisdiction of the court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the bill;³ and the bill

v. Van Noorden, 2 Cranch, 126; Turner v. Bank of North America, 4 Dallas, 11; Scott v. Sandford, 19 How. 393.

¹ 18 U. S. Stat. at L., ch. 137, sec. 5, pp. 470-473; 24 U. S. Stat. at L., ch. 373, sec. 6, p. 552; 25 U. S. Stat. at L., ch. 866, sec. 6, p. 434.

² Tennessee v. Union & P. Bank, 125

U. S. 454; Metcalf v. Watertown, 128 U. S. 586.

³ Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382; Robertson v. Cease, 97 U. S. 646, 651; Hancock v. Holbrook, 112 U. S. 231; Taylor v. Life Ass'n, 112 U. S. 719; Continental Life Ins. Co. v. Rhoads, 119 U. S. 239;

should show with equal distinctness that all of the plaintiffs, or all of the defendants, are citizens of the state, and are inhabitants of the district in which the suit is brought;¹ and it is not sufficient to state the citizenship of the parties in the introductory part of the bill, but it should be directly and positively averred in the stating part of the bill.² In suits by or against a corporation, where the jurisdiction is based upon the citizenship of the parties, it is not sufficient to aver simply that the corporation is a citizen of a particular state, but it should be averred that the corporation was created by the laws of the state of its incorporation, and that it is a citizen of that state, having its principal place of business therein.³ In suits brought to enjoin the infringement of letters patent, it should be averred that the defendant is an inhabitant of the district where the suit is brought, or that the defendant has committed acts of infringement and has a regular and established place of business in that district.⁴ Where the jurisdiction depends upon the alienage of one party, it should be averred not only that he is an alien, but also that he is a citizen and subject of some foreign state, and that the other party is a citizen of some one of the United States.⁵ The judiciary act now in force provides: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made;"⁶ and a bill by an assignee,

Capron v. Van Noorden, 2 Cranch, 126; Brown v. Keene, 8 Pet. 115; Godfrey v. Terry, 97 U. S. 171; Hornthall v. Keary, 9 Wall. 560.

¹ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; Smith v. Lyon, 133 U. S. 315, 320; Southern Pac. Co. v. Denton, 146 U. S. 202; Shaw v. Quincy Mining Co., 145 U. S. 444, 453; Re Keasby & Mattison Co., 160 U. S. 221, 231.

² Jackson v. Ashton, 8 Pet. 148.

³ United States Exp. Co. v. Kountz, 8 Wall. 342; Lafayette Ins. Co. v. French, 18 How. 404; Marshall v.

Balt. & Ohio R. Co., 16 How. 314; Louisville, C. & C. R. Co. v. Letson, 2 How. 497; Dodge v. Tulleys, 144 U. S. 451.

⁴ 29 U. S. Stat. at L., ch. 395, p. 695.

⁵ Hodgson v. Bowerbank, 5 Cranch, 303; Jackson v. Twentyman, 12 Pet. 136; Prentiss v. Brennan, 2 Blatch. 162, Fed. Cas. No. 11,385; Rateau v. Bernard, 3 Blatch. 244, Fed. Cas. No. 11,579; Bors v. Preston, 111 U. S. 252.

⁶ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

not embraced in one of the exceptions, filed in a circuit court of the United States, to recover the contents of such chose in action, must show affirmatively, by apt averment, that the original payee of such chose in action could have maintained a suit thereon in that court.¹

§ 126. How and when jurisdictional facts are to be averred in removal cases.—A case not dependent on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States on the ground that it arises under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.² But the right of the defendant to remove a case to a circuit court of the United States from a state court on the ground of diverse citizenship of the parties, or that the defendant is a federal corporation, cannot be cut off by the plaintiff's averments or lack of averments respecting the parties; and in such cases the jurisdictional facts may be averred in the petition for removal, and that will be sufficient to give the United States circuit court jurisdiction of the case.³

§ 127. Every fact essential to plaintiff's right must be stated in the bill.—It is a general rule in equity pleading that every ultimate fact essential to the plaintiff's right to maintain the suit, and obtain the relief prayed for, must be stated positively, and with certainty, accuracy and precision, in the bill; and relief will not be granted for matters not averred in the bill, although they may be apparent from other parts of the pleadings, and from the evidence in the cause.⁴ The requisites

¹ *Parker v. Ormsby*, 141 U. S. 81; *Bradley v. Hunt*, 8 Wall. 393.

² *Tennessee v. Union & P. Bank*, 152 U. S. 454; *Chappell v. Waterworth*, 155 U. S. 102; *Postal Tel. Cable Co. v. United States*, 155 U. S. 482; *Oregon S. L. & U. N. R. Co. v. Skottow*, 162 U. S. 490; *Walker et al. v. Collins et al.*, 167 U. S. 57, 60; 18 U. S. Stat. at L., ch. 137, sec. 2, p. 470;

24 U. S. Stat. at L., ch. 373, sec. 2, p. 553; 25 U. S. Stat. at L., ch. 866, sec. 2, p. 433.

³ *Texas & Pacific R. Co. v. Cody*, 166 U. S. 606, 618; 18 U. S. Stat. at L., ch. 137, sec. 2, p. 470; 24 U. S. Stat. at L., ch. 373, sec. 2, p. 553; 25 U. S. Stat. at L., ch. 866, sec. 2, p. 433.

⁴ *Redesdale* (6th Am. ed.), 45; *Story*, Eq. Pl., secs. 252, 253, 254, 255, 256, 257;

of a bill in equity, in the circuit courts of the United States, considered simply as a pleading for the purpose of presenting to the court the plaintiff's title to relief, and not as a means of discovery to obtain evidence to support that right, are: (1) It must state facts which constitute a case within the jurisdiction of a court of equity, and for which there is not a plain, adequate and complete remedy at law, tested by the remedies administered by courts of common law and equity, respectively, in England, at the time of the enactment of the original federal judiciary act;¹ (2) it must show with certainty, accuracy and precision that all the plaintiffs have an actual existing right to, or interest in, the thing demanded or the subject-matter of the suit, and that they have a present right to institute the suit; (3) it must show by whom and in what manner the plaintiffs have been injured, and that all of the defendants are liable to the demand of the plaintiffs, or that they have some interest in, or claim to, the subject-matter which should be adjudicated in that suit.² It is not necessary that the plaintiff should, as a basis of relief, set out all the minute facts and collateral circumstances of his case;³ but he may, at his option, state in his bill any such minute facts and collateral circum-

1 Daniell, 430; *St. Louis v. Knapp*, 104 U. S. 658; *Harrison v. Nixon*, 9 Pet. 483; *Stark v. Starr*, 94 U. S. 477; *Stearns v. Page*, 7 How. 819, 829; *Darcy's Ex'rs v. Cheney*, 34 U. S. App. 56, 57; s. c., 68 Fed. R. 767; *Crockett v. Lee*, 7 Wheat. 522, 525; *Jackson v. Ashton*, 11 Pet. 229; 1 *Hawks (N. C.)*, 359; *Langdon v. Godard*, 2 Story, 267, Fed. Cas. No. 8,060; *Foster v. Goddard*, 1 Black, 506; *Grosholz v. Newman*, 21 Wall. 481.

¹ 1 U. S. Stat. at L., ch. 20, sec. 16, p. 82; U. S. R. S., sec. 723; *Buzard v. Houston*, 119 U. S. 347; *McConihay v. Wright*, 121 U. S. 201; *Whitehead v. Shattuck*, 138 U. S. 146; *Scott v. Neely*, 140 U. S. 105; *Smyth v. New Orleans Canal & Bank Co.*, 141 U. S. 656; *Tyler v. Savage*, 143 U. S. 79; *Kilbourn v. Sunderland*, 130 U. S. 505; *Litchfield v. Ballou*, 114 U. S. 190; *Roat v. Lake Shore & Michigan Southern R. Co.*, 105 U. S.

189; *Killian v. Ebbinghaus*, 110 U. S. 568; *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806; *Payne v. Hook*, 7 Wall. 425; *Thompson v. Central Ohio R. Co.*, 6 Wall. 134; *Oelrichs v. Williams*, 15 Wall. 211; *Shields v. Barrow*, 17 How. 130; *Hipp v. Babin*, 19 How. 271; *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black, 545; *Dade v. Irwin*, 2 How. 383; *Magniac v. Thompson*, 15 How. 281; *Hayward v. Andrews*, 106 U. S. 672; *New York Guaranty & Ind. Co. v. Memphis Water Co.*, 107 U. S. 205; *Fenn v. Holme*, 21 How. 481; *Van Norden v. Morton*, 99 U. S. 378; *Francis v. Flynn*, 118 U. S. 385.

² 1 Daniell, 412-432; *Story, Eq. Pl.*, secs. 260, 261, 262, 263, 264; *House v. Mullen*, 22 Wall. 42, 47.

³ *Dunham v. Eaton & H. R. Co.*, 1 Bond, 492, Fed. Cas. No. 4,150; *Story, Eq. Pl.*, sec. 28.

stances, the admission of which by the defendant may be material evidence to prove the plaintiff's case, or to counterprove and destroy the defense which may be set up by the defendant.¹ A bill in equity to set aside a judgment or decree of a court of competent jurisdiction on the ground that it was obtained by fraud must set out distinctly and positively the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed upon;² and a bill to set aside or annul a patent issued by the United States for public lands, or to correct it, on the ground of mistake or fraud, must set out distinctly and positively the particulars of the fraud, and the character of the mistake, and how it occurred.³ It is a general rule that a bill seeking relief upon the ground of fraud should point out and distinctly and positively allege the particular facts and acts which constitute the fraud, with reasonable certainty as to time and place, and the names of the parties by whom committed, and the manner in which the plaintiff has been injured.⁴ But in stating the facts which constitute the fraud, where relief is sought in a bill in equity upon that ground, it is not necessary that all the evidence which may be adduced to prove that fraud should be recited in the bill; it is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him.⁵ In order to excuse gross laches in prosecuting a claim, or long acquiescence in the assertion of an adverse right, on the ground of fraud or concealment, the plaintiff should "set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraud-

¹ *Hawley v. Wolverton*, 5 Paige, 522-525; *Mechanics' Bank v. Levy*, 3 Paige, 606; *Story, Eq. Pl.*, sec. 268. *How.* 69; *Patton v. Taylor*, 7 *How.* 132; *Van Weel v. Winston*, 115 U. S. 228, 237; *Ambler v. Choteau*, 107 U. S. 586, 591; *St. Louis, etc. Ry. Co. v. Johnson*, 133 U. S. 577; *La Fayette Co. v. Neely*, 21 *Fed. R.* 744; *Carr v. Fife*, 44 *Fed. R.* 713.

² *United States v. Atherton*, 102 U. S. 372.

³ *United States v. Atherton*, 102 U. S. 372.

⁴ *United States v. Atherton*, 102 U. S. 372; *Knox Co. v. Harshman*, 133 U. S. 156; *Moore v. Hawkins*, 19 *Story, Eq. Pl.*, sec. 252.

⁵ *United States v. American Bell Telephone Co.*, 128 U. S. 315, 373; *Story, Eq. Pl.*, sec. 252.

ulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations.”¹

§ 128. Common-law rules of pleading followed in equity pleading.—The rules of pleading which control in the preparation and draft of bills in equity are not as strict as those rules of pleading required in declarations and other pleadings at common law; no technical expressions, nor use of any particular form of words, is absolutely necessary in the preparation of the bill; all that is required is that the pleader shall select and use such words and terms and forms of expression as shall be adequate to convey his meaning, and aptly state the case in equity intended to be presented by the bill;² and the case should be stated briefly and succinctly.³

“Although the rules in pleadings in courts of equity, especially in the case of bills, are not so strict as those adopted in courts of law, yet, in framing pleadings in equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of common-law pleadings, whenever such rules are applicable to the case which he is called upon to present to the court; for there can be no doubt that the stated forms of description and allegation which are adopted in pleadings at law have all been duly debated under every possible consideration, and settled upon solemn deliberation, and that, having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the court; and if this be so at law, there appears to be no reason why they should not be considered as equally applicable to pleadings in courts of equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary courts.”⁴

But in adhering to the common-law rules of pleading, and the

¹ *Badger v. Badger*, 2 Wall. 87;
Richards v. Mackall, 124 U. S. 183,
189; *Sullivan v. Portland & K. R. Co.*,
94 U. S. 811.

² 1 Daniell, 468.

³ Equity Rule 26.

⁴ 1 Daniell, 466-474.

use of the stated forms of description and allegation in common-law pleadings, in the preparation of bills in equity, it is frequently necessary to accompany such forms of allegation with other words to enlarge their meaning, and to extend them to equitable rights, interests and estates.¹ And it must also be recollected that a bill in chancery is not only a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which the complainant's right to relief rests, as in a declaration in a suit at law, but it is also, in most cases, an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the complainant's case, or to counterprove or destroy the defense which may be set up by such defendant in his answer; and the complainant may, therefore, state any matter of evidence in the bill, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in destroying the defense of the defendant, or in ascertaining or determining the nature and extent or the kind of relief to which the complainant may be entitled, consistently with the case made by the bill, or which may legally influence the court in determining the question of costs;² and in drafting a bill in equity the pleader may, and should if he desires discovery, add to the stated common-law forms of description and allegation such other pertinent allegations as will form the ground for interrogatories to be propounded to the defendant in a subsequent part of the bill for the purpose of eliciting from him admissions and discovery to prove the plaintiff's case.³

§ 129. Same — Pleading title to real property.— In suits in equity, as well as in actions at law, if the plaintiff seeks to establish in himself a right to or interest in real property, or seeks to obtain any relief in regard to such property, as the removal of cloud from title, he must, in his bill, make a proper and sufficient averment of his title. In no class of litigation are the common-law rules of pleading more closely followed in equity than in bills concerning the title to real property;⁴ and,

¹ 1 Daniell, 467.

³ 1 Daniell, 467.

² Hawley v. Wolverton, 5 Paige, 523; Mechanics' Bank v. Levy, 3 Paige, 606.

⁴ 1 Daniell, 466-474.

if not necessary, it is certainly very convenient for a work on equity procedure, intended for the use of the busy lawyer, to contain a statement of the common-law rules of pleading upon this subject, which are, therefore, given in the language of the text-books.

One writer states these rules as follows: "In actions for wrongs to real or personal property, the plaintiff's right or title must be set forth in the declaration, either generally or specially. Where a special title is necessary to maintain the action it must be stated with certainty. If a man allege in himself a title to the inheritance of freehold of lands in possession, he ought regularly to say that he was seized; or if he allege possession of a term for years, or other chattel real, that he was possessed. So if he alleges seisin of things manurable, as of lands, tenements, rents, he should say that he was seized in his demesne as of fee; if of things not manurable, as of an advowson, that he was seized as of fee and right, omitting in his demesne. And it is a rule that where title is necessary to be shown, if the plaintiff derive a particular estate from another, he ought to show that the other had such an interest as would enable him to make the estate. The reason why the commencement of particular estates must be shown in pleadings is because they are created by agreement out of the primitive estate; and the court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed; and this is a fundamental rule which ought not to be broken upon fancied inconveniences. It is also a rule that if the plaintiff claim under one who has only a particular estate, as for life, he must aver the continuance of that estate.

"In setting forth a title to incorporeal hereditaments the plaintiff must show that it was by grant, custom or prescription. A grant ought regularly to be pleaded with a *profert in curia* of the deed containing it; but where the deed is lost or destroyed, by accident or length of time, it may be pleaded without a *profert*. Custom is properly a local usage and not annexed to any particular person; such as a custom within a manor that lands shall descend to the youngest son or that copyholders shall have a right of common. Prescription is altogether a personal usage; and it is in a *que estate* or in a man and his ancestors; the former is where the right claimed

is annexed to and passes with the land, in which case the plaintiff states that he, and all those whose estate he hath therein, have immemorially had such right; the latter is where the right is not annexed to the land, but lies in grant, in which case the plaintiff must aver that he and his ancestors have immemorially enjoyed it.”¹

Another writer states the rule substantially as follows: “There is a leading distinction on this subject between estates in fee-simple and particular estates. In general it is sufficient to state a seisin in fee-simple, *per se*; that is, simply to state (according to the usual form of alleging title) that the party was seized in his demesne as of fee of and in a certain messuage, without showing the derivation, or (as it is expressed in pleading) the commencement of the estate. For if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principle, to show from whom that person derived his, and so *ad infinitum*. Besides, as mere seisin will be sufficient to give an estate in fee-simple, the estate may, for anything that appears, have had no other commencement than the seisin itself, which is alleged. So, though the fee be conditional or determinable on a certain event, yet a seisin in fee may be alleged without showing the commencement of the estate.

“However, it is sometimes necessary to show the derivation of a fee, viz.: where in the pleading the seisin has already been alleged in another person, from whom the present party claims. In such case it must of course be shown how it passed from one of these persons to the other. . . . With respect to particular estates, the general rule is that the commencement of particular estates must be shown. If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years or a tenancy at will, he must show the derivation of that title from its commencement, that is from the last seisin in fee; and if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth. . . . To the rule that the commencement of particular estates must be shown there is this exception, that it need not be shown where the title is alleged by way of inducement only. . . .

¹ Tidd's Practice, 393, 394.

“Where a party claims by inheritance, he must in general show how he is heir, viz., as son or otherwise; and if he claim by mediate, not immediate, descent, he must show the pedigree; for example, if he claims as nephew, he must show how he is nephew.

“Where a party claims by conveyance or alienation, the nature of the conveyance and alienation must in general be stated, as whether it be by devise or feoffment. . . .

“Where the nature of a conveyance is such that it would at common law be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires at common law a deed or other written instrument, such instrument must be alleged. . . . A devise of land must be alleged to have been made in writing, which is the only form in which the statute authorizes it to be made. So if a conveyance by way of grant be pleaded, a deed must be alleged; for matters that lie in grant (according to the legal phrase) can pass by deed only.”¹

Another author states the rules as follows: “Whenever it is necessary for a party, in any stage of the pleadings, to show an estate in fee-simple, it is sufficient in general to allege the estate in general terms (as that he, or another, was seized in his demesne as of fee), without stating when or how the estate commenced or was created. But when title to any particular estate, as an estate in tail, for life or years, is necessary to be shown in a plea in bar, avowry, replication, or any of the pleadings subsequent to the declaration, the commencement of the estate and the mode of its derivation must be specially stated.

“The principal reason of the diversity appears to be that an estate in fee-simple may be, and frequently is, acquired by means consisting of sheer matter of fact (as by a continued disseisin of the rightful owner, or by long possession), of which the jury is competent to judge, and which need not, therefore, be specially shown to the court upon the record; and hence a general allegation of a seisin in fee-simple is traversable. Whereas, particular estates, which must always be derived out of the fee-simple, can regularly be created only by legal conveyance or by operation of law; both of which modes of ac-

¹ Stephen on Pleading (Heard), 303-312.

quisition necessarily involve matter of law, of which the jury are not competent judges; and therefore a general allegation of a seisin or possession of such an estate (in a plea, etc.) is ill, because it improperly blends law and fact, and therefore is not traversable.

“It is hence necessary, when title to estates of the latter kind is to be averred in a plea, avowry, etc., that the time and manner of their derivation be specially shown in the pleading, that the plaintiff may be able to traverse distinctly any particular point in the title. For, as there is no general issue to pleas, avowries, replications, etc., no traverse can, in general, be taken upon them otherwise than by denying precisely some or all of the specific allegations contained in them.”¹

It will be observed that, according to the last author cited, in pleading title at common law it is necessary to show the commencement of particular estates only in the pleadings subsequent to the declaration, and that the object of the rule is to prevent the improper blending of matters of law and fact, and to give the opposite party the opportunity to traverse distinctly any particular point in title, and to submit separately the questions of law to the court and the questions of fact to the jury. In suits in equity the judge decides the issues of fact as well as the issues of law; and, although a bill in equity must contain a sufficiently certain, though general, statement of the essential ultimate facts upon which the plaintiff rests his claim for relief,² yet, Mr. Daniell was of opinion that, in either a declaration at common law or a bill in equity, a general allegation of title is, as a general rule, sufficient.³

While the plaintiff must tender an issue as to the title to the land which he sues for, yet it is not necessary that he should deraign his title upon the record; nor is it necessary for him to set forth all the facts relating to his title; nor is it necessary for him to set out in his declaration or complaint his muniments of title, nor to attach copies of his title papers to his pleading; it is sufficient for the plaintiff to allege that he has lawful title to the premises and is entitled to possession, which the defendant in possession wrongfully withholds from

¹ Gould's Pl. (4th ed.), secs. 22, 23, 24.

³ 1 Daniell, 467.

² Story's Eq. Pl., secs. 23, 24, 241;

St. Louis v. Knapp, 104 U. S. 658.

him; and an averment that the plaintiff is the owner in fee-simple of the lands sued for is a sufficient averment of his title, and such averment is not demurrable as being a conclusion of law.¹

In a bill in equity, a general averment of title to real estate, as that the plaintiff is seized in fee, or is the owner in fee, or is seized and possessed, is, as a general rule, sufficient.² In one of the cases³ cited from the supreme court of Wisconsin, Chief Justice Dixon, delivering the opinion of the court, said: "The pleadings in this case were made up anterior to the adoption of the code, and according to the system which formerly prevailed in the courts of chancery. The counsel for the appellant referred us to no adjudications in which it has been held that it was bad or insufficient pleading, in a bill or answer in equity, to allege that certain named parties were heirs at law of a deceased person, and that as such upon his death they succeeded to certain of his rights. Upon examination we can find no authorities sustaining such a position. On the other hand, we find in several books or collections of precedents, of well-established authority and reputation, each of which may be regarded as having received the sanction and approval of competent tribunals, that, both at common law and in equity, this form of averment was frequently used. Curtis' Eq. Pl. 74, 87; 2 Bar. Ch. Pr. 559, 566; 2 Chitty's Pl. 468, 469. The two things taken together would seem to establish, as matter of authority, that the allegation in the bill of revivor, before the same was amended, that the complainants therein were the heirs at law of Benoni R. Gillett, deceased, intestate, to whom the real estate described in the original bill filed by him descended by the laws of descent, was sufficient, and that consequently no amendment was necessary. On general principles we do not see why

¹Keller v. Oceana, 48 Cal. 638; Coryell v. Caine, 16 Cal. 567; Salmand v. Symond, 24 Cal. 260; Brown v. Martin, 25 Cal. 82; Payne v. Treadwell, 16 Cal. 220; Johnson v. Vance, 86 Cal. 128; Walter v. Lockwood, 23 Barb. (N. Y.) 228; People v. New York, 28 Barb. (N. Y.) 240.

²Dunlap v. Gibbs, 4 Yerg. (Tenn.) 94; Sharp v. Fields, 1 Heisk. (Tenn.)

571; Gillett v. Robbins, 12 Wis. 319; Iowa County v. Mineral Point R. Co., 24 Wis. 115, 120; Wilson v. Hill, 46 N. J. Eq. 367; Johnson v. Vail, 14 N. J. Eq. 423; Holman v. Norfolk Bank, 12 Ala. 369; McKenzie v. Baldrige, 49 Ala. 564; Gage v. Kaufman, 133 U. S. 471; Simons Creek Coal Co. v. Doran, 142 U. S. 417, 450.

³Gillett v. Robbins, *supra*.

such statement ought not then to have been, and would not now be, considered as a good averment of a fact which it was material for the complainants to allege and prove in order to maintain the action. Although it may in strictness be said that, whether one person is, or is not, the heir at law of another who is dead, is a mixed question of law and of fact; and that the averment that he is so, is in part a conclusion of law, to be deduced from several intermediate facts which must be established in evidence; still it is so much in the nature of a fact, and its statement in this form so fully apprises the opposite party of the foundation of the claim set up against him, that the law, which favors brevity and conciseness, and the avoidance of unnecessary allegations in pleading, treats it as such. Many analogous instances of mixed matters of law and fact being, for the purpose of pleading, treated as facts, might be cited. Such, in particular, are statements of title or ownership of property, both real and personal. The averment that a party is the owner of an article of personal property, in relation to which he claims some right or some redress in a court of law or equity, will, we think, when subjected to a rigid analysis, be found to be quite as much, if not more, a conclusion of law than a statement of fact; yet our daily experience and constant practice prove that such averments are, and ever have been, considered good. The same is true of the title or seisin of real property, the proof of which often depends upon a long succession of conveyances, each of which must, on the trial, be established by competent testimony, but none of which has it ever been the custom to set out in the pleadings. It is difficult to perceive any reason which would require parties claiming to be the heirs of a deceased person to state the several degrees of their relationship to the deceased, with all the accompanying circumstances, which would not equally require one asserting title to realty to set out the several links in the chain by virtue of which he proposes to connect himself with the original source of the title. In either case it is a technical nicety, which the law, looking more to the correct and easy administration of justice than to absolute logical harmony, does not demand. Both, when plainly and directly stated, though partaking somewhat of the nature of legal conclusions, are deemed sufficient to inform the opposite party of the founda-

tion of the claim made against him, which is the principal object of all pleadings. Any other rule in such cases would lead to a needless particularity and burdensome prolixity of statement oftentimes very difficult to be attained. Hence, we are of opinion that no amendment of the bill in this case was required." The reasoning of the opinion in this case was nine years later approved and applied in another case by the supreme court of Wisconsin.¹

The supreme court of the United States, upon a demurrer to a bill in equity to remove cloud from title to real estate, upon the ground that the bill did not sufficiently state the plaintiff's title, laid down the following rule upon the subject: "An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish the ultimate facts; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff."² In a similar case "the bill alleged that the plaintiff was seized in fee-simple of the lands; that the defendant claimed title to them under two tax deeds." There was a demurrer to the bill upon the ground that it did not sufficiently aver the plaintiff's title and possession. The supreme court overruled the demurrer, and held that "the allegation that the plaintiff is seized in fee-simple is a sufficient allegation that he has the possession as well as the title."³ In equity pleading the supreme court of the United States has classified facts as follows: (1) The essential ultimate facts upon which the plaintiff rests his claim for relief; and (2) the probative facts, which as evidence go to establish the ultimate facts.⁴ The former must be always averred in the bill;⁵ the latter may, at the election of the pleader, be averred in the bill for the purpose of obtaining from the de-

¹ Iowa County v. Mineral Point R. Co., *supra*.

² Ely v. New Mexico & Arizona Ry. Co., 129 U. S. 291, 294; More v. Steinbach, 127 U. S. 70, 85.

³ Gage v. Kaufman, 133 U. S. 471;

Simons Creek Coal Co. v. Doran, 142 U. S. 417, 450.

⁴ Ely v. New Mexico & Arizona Ry. Co., 129 U. S. 291.

⁵ St. Louis v. Knapp, 104 U. S. 658.

fendant a discovery and admission of them, as proof to establish the former, and also to disprove and destroy the defense that may be set up to the bill by the defendant in his answer. But there is no rule of pleading requiring that the probative facts be averred, and their omission is no ground of demurrer. In pleading a devise of real estate the bill should aver that the will was in writing, and that it was executed and attested in such manner as by law is required to pass freeholds by devise, and that it has been duly admitted to probate in a court having jurisdiction and in the manner required by law.²

§ 130. Same — Conditions precedent must be averred in the bill.—Suits in equity, invoking equitable remedies to establish equitable rights, interests and estates, are, like actions at law, frequently based upon writings, deeds, contracts and covenants; and in such cases the original bill should contain all the requisites of a declaration at law in similar cases, with the addition of such other words as may be apt and appropriate to describe the equitable rights, interests and estates which are sought to be established by the suit, accompanied with such further allegations as may be necessary to lay the foundation for interrogatories to be put to the defendant in a subsequent part of the bill.³

In every action at law upon contract the declaration states the contract and the breach; and if the contract fully explains the promise and the consideration, without reference to any collateral matter, they are stated in the declaration without inducement; but where the contract is not of this character, the declaration begins by stating, by way of inducement, the circumstances under which the contract was made, or to which the consideration refers, and then proceeds to state the contract and the breach.⁴ The considerations of contracts are of three kinds, viz. (1) Executed considerations, where the contract is founded upon something already done or past before the making of the promise. (2) Executory considerations, where the contract is founded upon something to be afterward

¹ Story's Eq. Pl., sec. 268; Hawley v. Wolverton, 5 Paige, 526; Mechanics' Bank v. Levy, 3 Paige, 606.

² 1 Daniell, 474.

³ 1 Daniell, 466, 469.

⁴ 1 Tidd's Prac. 381.

done or performed. (3) Concurrent considerations, as upon mutual promises, where the plaintiff's promise is executed, but the thing that he has engaged to perform is executory; this class of considerations is said to partake of the nature of both the preceding ones. Where the consideration is executory, its execution is a condition precedent to the performance by defendant of his covenant or agreement, and the plaintiff cannot bring his action till the consideration has been performed.¹

It is a fundamental rule of common-law pleading that where a right, interest or estate commences upon a condition precedent, whether the condition or act be in the affirmative or negative, and whether it is to be performed by the plaintiff or the defendant, or any other person, and whether the condition be imposed by law or by contract, or a will, the plaintiff, in a suit to recover such right, interest or estate, must aver in his declaration the performance of the condition precedent; a general averment of performance is not sufficient, but the plaintiff must aver positively and specially the manner of performance, with certainty of time and place.² And in the very nature of things this rule of pleading must be followed in bills in equity, because a condition precedent goes to the foundation of the right; and it is a rule of equity pleading that every ultimate fact essential to the plaintiff's right to maintain the suit and obtain the relief prayed for must be averred in the bill.³

The rule requiring that conditions precedent be specially pleaded was stated by Cowen, Justice, in a case decided by the supreme court of New York in 1840, as follows: "It is quite obvious that the liability of the defendant to any extent depended on conditions prescribed in the agreement to be performed by the plaintiff. He is therefore bound to show in proper form the actual fulfillment of those conditions, or some excuse why they have not been fulfilled. . . . It is quite well established that where a specific act is to be done by the

¹ 1 Tidd's Prac. 379, 381; 1 Chitty's Pl. (9th Am. ed.) 295, 296.

² 1 Tidd's Prac. 379, 381; 1 Chitty's Pl. (9th Am. ed.) 296, 297; Glover v. Tuck, 24 Wend. (N. Y.) 153; United States v. Beard, 5 McLean, 441, Fed.

Cas. No. 14,551; Hart v. Rose, Hempst. 238, Fed. Cas. No. 6,154a; Reining v. City of Buffalo, 102 N. Y. 308; Howland v. Edmonds, 24 N. Y. 307; Williams v. Healey, 3 Den. (N. Y.) 364.

³ *Ante*, § 125.

plaintiff, or any number of acts, by way of condition precedent, he must show in pleading precisely what he has done by way of performing them. If a deed is to be given, or money to be paid, or services to be performed, he must either aver in so many words that the deed has been given, the payment made, or work done; or that each by name was tendered and refused, with such circumstances as are material in point of law to raise the corresponding obligation. This enables the court to see whether the defendant be in fault, and presents matter on which he can take a definite issue. The allegation of performing everything or offering to perform everything involves in itself many possible acts of performance, and invites an issue upon all of them. It cannot be seen upon what the parties go to trial.”¹

In view of the rule of pleading above stated, it is always important to ascertain whether the covenants of an agreement are conditions precedent or conditions subsequent, or mutual and concurrent conditions. There are three kinds of covenants, viz.: (1) Such as are called mutual and independent, where either party may maintain a suit against the other for breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. (2) There are covenants which are conditions dependent on each other; in which the performance of one depends on the prior performance of the other, and, therefore, till the prior conditions be performed the other party is not liable to an action on his covenant. (3) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either was obliged to do the first act.² The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties to be deduced from the whole instrument; and however transposed they may be in the deed, their precedency must

¹ Glover v. Tuck, 24 Wend. 153.

² 1 Tidd's Prac. 382; 1 Chitty's Pl. (9th Am. ed.) 321, 322.

depend on the order of time in which the intent of the transaction requires their performance.¹

In a case decided by the supreme court of New York in 1830, *Savage*, Chief Justice, stated the following rules for the construction of covenants: "The question is whether the performance of the plaintiff's part of the agreement was a condition precedent to the payment by defendant, or whether the covenants are mutual and independent. . . . The only cardinal rule is to construe covenants according to the meaning of the parties and the good sense of the case. To ascertain that intention some general rules are deduced from the adjudicated cases: (1) If a day be appointed for the performance of any act, and such a day is to happen or may happen before the performance of the act which is the consideration for the first mentioned act, then the covenants are considered mutual and independent, and an action may be brought without averring performance of the consideration; for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent; and so it is when no time is fixed for the performance of the consideration. (2) But when the day appointed for the payment of money or performance of an act is to happen after the thing which is the consideration is to be performed, no action can be maintained before performance of the condition. (3) Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be brought for a breach of the covenant by the defendant without averring performance; and when a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing anything for it; and therefore the law obliges him to perform the agreement on his part, and leaves him to the remedy to recover damages for not receiving the whole consideration. (4) But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and dependent.

¹ 1 Tidd's Prac. 382; 1 Chitty's Pl. delphia & Wilmington R. Co. v. Howard, 13 How. 307, 339; *Lawber v. Electric Ass'n*, 128 U. S. 447; *Phila- Bangs*, 2 Wall. 728.

(5) Where two acts are to be done at the same time, neither party can maintain an action without showing performance or an offer to perform his part.”¹ The supreme court of the United States, speaking through Justice Swayne, quoted with approval the following rules for the construction of covenants:

(1) “The rule has been established, by a long series of adjudications in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case, and to which intention, when once discovered, all technical forms of expression must give way.” (2) “When mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, then the remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.”²

Where the vendor is not by his contract bound to convey unless the money due on the first instalment be paid, the covenants of the contract are not independent, but are concurrent and reciprocal, and in such case the purchaser is not bound to pay unless the vendor can convey a good and valid title free from incumbrance; the legal effect of a covenant to sell is that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title; and where the words of plaintiff’s covenant are “that he will make a deed” to his vendee, the meaning of these words in the contract requires that the deed shall convey the land; and in a suit on the contract by the vendor against his vendee for the purchase-money, it is not sufficient for the plaintiff to aver his readiness to perform according to the letter of the contract, if there is no averment that the plaintiff has a good title; the performance must always be averred according to the intent of the parties, and it is not sufficient to pursue the words of the contract in the pleading, if the performance according to the intent be not alleged.³ The plaintiff is not obliged to aver readiness to perform a contract, where in his declaration or bill he avers facts and circumstances which show that the de-

¹ *Tompkins v. Elliott*, 5 Wend. 497.

³ *Turner v. Ogden*, 66 U. S. 450, 459.

² *Lawber v. Bangs*, 2 Wall. 728, 729.

fendant had excused his non-performance; and where the plaintiff has partly performed his contract, and the defendant has failed to perform his corresponding duty under the contract and has defaulted on a payment due, the plaintiff is not required to go on to a further performance at the hazard of further loss. And if the plaintiff, who is a builder, has done a valuable part of the work under his contract, but yet fails to complete the structure within the time limited by his contract, the defendant may abandon the contract for such failure; but if, after such failure, defendant urges the plaintiff to go on and pays him for part of his work, the defendant thereby waives strict performance as to time so far as to consent to be liable on his covenant for the contract price of the work when completed, and the plaintiff may, by alleging and proving the facts, recover for work actually done.¹

A decree in equity for the specific performance of a contract for the sale of real estate is not of absolute right, but one which rests entirely in judicial discretion, to be exercised according to the settled principles of equity and not arbitrarily or capriciously, and always with reference to the facts of the particular case;² and in every suit for specific performance the plaintiff in his bill should state positively, and with clearness, accuracy and precision, the terms and covenants of the contract sought to be enforced,³ with a certain description of the property which forms the subject-matter of the contract;⁴ and he should also aver that he has performed or offered to perform on his part the acts which formed the consideration for the covenant or undertaking on the part of the defendant, or he should tender performance in his bill and aver facts which show that he is ready and able to perform.⁵

¹ Phillips and Colby Construction Co. v. Seymour, 91 U. S. 646, 656.

² Pope Mfg. Co. v. Gormully, 144 U. S. 224; Hennessy v. Woodworth, 128 U. S. 438; Nickerson v. Nickerson, 127 U. S. 668; McCabe v. Matthews, 155 U. S. 550; Willard v. Taylor, 8 Wall. 557; Rutland Marble Co. v. Ripley, 10 Wall. 339.

³ Colson v. Thompson, 2 Wheat. 336; King v. Thompson, 9 Pet. 204; Carr v. Duval, 14 Pet. 77; Lee v.

Dodge, 5 Wall. 808; Preston v. Preston, 95 U. S. 200.

⁴ Preston v. Preston, 95 U. S. 200.

⁵ Colson v. Thompson, 2 Wheat. 336; Barr v. Lapsley, 1 Wheat. 151; Brashier v. Gratz, 6 Wheat. 528; Bank of Columbia v. Hagner, 1 Pet. 455; King v. Hamilton, 4 Pet. 311; Watts v. Waddle, 6 Pet. 389; Dorsey v. Packard, 12 How. 126; Bone v. Missouri Iron Co., 17 How. 340; Purcell v. Coleman, 4 Wall. 513; Rutland

§ 131. Deeds, contracts and other instruments must be pleaded according to their legal effect.—"It is a rule in pleading at common law that the nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words;" and this rule has always been enforced in equity pleading.¹ A United States equity rule provides that: "Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."² This is simply declaratory of an ancient rule, enforced with great rigidity in the English High Court of Chancery. The orders of Lord Bacon, Lord Clarendon and Lord Coventry provided in substance that counsel are to take care that bills be not stuffed with repetition of deeds, writings or records *in hæc verba*, but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief and effectual terms, to the end that the ancient brevity and succinctness in bills and other pleadings may be restored and observed.³ But where any question is likely to turn upon the precise words of an instrument, such words should be accurately set out in the bill.⁴

§ 132. The bill must not contain scandal nor impertinence. It is a rule of common-law pleading that if the declaration or any subsequent pleading contain a statement of any matter wholly foreign and irrelevant to the cause, or if relevant matter be stated with needless prolixity, such matter may be rejected as surplusage, and struck out on motion;⁵ and the same principle obtains in equity pleading.⁶ If the bill contains any "unnecessary recitals of deeds, documents, contracts or other instruments *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit, . . . it

Marble Co. v. Ripley, 10 Wall. 339; Walsh v. Preston, 109 U. S. 297; Morgan v. Morgan, 2 Wheat. 290; Hepburn v. Dunlop, 1 Wheat. 179; Hepburn v. Auld, 5 Cranch, 262; Cheney v. Libby, 134 U. S. 68; Relsey v. Crowther, 162 U. S. 404.

¹ 1 Daniell, 410, 411, 468, 469.

² Equity Rule 26.

³ 1 Daniell, 410, 411, 468, 469; 55 and 56 Ordinances Lord Bacon; Hood v. Inman, 4 Johns. Ch. 438, 440.

⁴ 1 Daniell, 469, 470.

⁵ Chitty's Pl. (9th Am. ed.), 228, 229.

⁶ 1 Daniell, 269.

may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order.”¹

A bill may contain matter which is impertinent but not scandalous; but all scandalous matter is necessarily impertinent.² “Scandal consists in the allegation of anything, either in a bill, answer or any other pleading, which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous. There are many cases, however, in which, though the words in the record are very scandalous, and highly reflecting upon the party, yet if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous.” “Nothing relevant is considered as scandalous.”³

Impertinence in a bill or other pleading consists in setting forth upon the record what is not necessary to be set forth; as stuffing them with recitals and long digressions as to matters of fact wholly immaterial. The recital of deeds, documents and other instruments *in hæc verba* is impertinence.⁴ But in determining whether an allegation or statement in a bill is relevant or pertinent, the bill must not only be regarded as a pleading to bring before the court and put in issue the material allegations and charges upon which the plaintiff’s right to relief rests, but also an examination of the defendant for the purpose of obtaining evidence to establish the plaintiff’s case, or to counterprove or destroy the defense which the defendant may attempt to set up.⁵ The best rule to ascertain whether matter be impertinent is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties in the cause before the court.⁶

¹ Equity Rule 26.

² Story, Eq. Pl., sec. 270.

³ 1 Daniell, 452, 453; Redesdale (6th Am. ed.), 58.

⁴ Hood v. Inman, 4 Johns. Ch. 437; Equity Rule 26; 1 Daniell, 454-457.

⁵ Hawley v. Wolverton, 5 Paige Ch. 522.

⁶ Woods v. Morrell, 1 Johns. Ch. 103.

§ 133. Same — Inherent power of the court over its own records.—“The authority to control the volume and character of the pleadings and proceedings before it, and to strike from its files those that are obnoxious to its rules and practice, is necessary to the speedy and efficient administration of justice, and is one of the inherent powers of a court of chancery, which has been exercised without question since the establishment of such courts. Prolivity, tautology, scandal and impertinence have been among the common faults of bills in equity time out of mind. . . . The supreme court leveled equity rules 26 and 27 at these evils. . . . These rules provide that scandalous and impertinent matter may be stricken out by a master after exceptions have been filed, but they do not abrogate nor curtail the inherent power of the federal courts sitting in equity to strike out rambling or tautological pleadings, and to purge their records of scandalous or impertinent matter on their own motion, regardless of the absence of exceptions. They (the equity rules) were adopted not to limit the power, but to lighten the burdens, of those courts. The authority and duty of a federal court to keep its records free from stain and scandal are by no means dependent on the ability or disposition of counsel for the litigants before it, but its power is plenary, and its duty imperative, whatever the action of counsel may be.”¹

§ 134. The bill must not be multifarious.—It is a rule in equity that two or more distinct subjects cannot be embraced in the same suit; the offense against this rule is termed multifariousness, and will render a bill liable to demurrer; in order, however, to determine whether a suit contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct; for if the object of the suit be single, but different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such

¹Sanborn, Circuit Judge, in *Kelley v. Boettcher*, 85 Fed. R. 57, citing *Ex parte Simpson*, 15 Ves. 476; *Christie v. Christie*, 8 Ch. App. 499; *Campbell v. Taul*, 3 Yerg. 548, 563; *Langdon v. Goddard*, 3 Story, 13, Fed. Cas. No. 8,061; *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952; *Green v. Elbert*, 137 U. S. 615, 624, 11 Sup. Ct. R. 188; *Kelley v. Boettcher*, 49 U. S. App. 620, 27 C. C. A. 177, and 82 Fed. R. 794.

different persons must be brought before the court in order that the suit may conclude the whole subject.¹

Chancellor Walworth, upon a review of the English cases, stated the rule in regard to multifariousness as follows: "The appellant's counsel is wrong, however, in supposing that two distinct and independent matters or claims by the same complainant against the same defendant cannot properly be united in one bill. Multifariousness, properly speaking, is where different matters having no connection with each other are joined in one bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which the suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested, and with which they have no connection. But a simple misjoinder of different causes of complaint between the same parties, which causes cannot conveniently and properly be litigated together, is sometimes called multifariousness; though the ground of objection in such cases depends upon an entirely different principle, and is a mere question of convenience in the administration of justice. In cases of strict multifariousness the objection to the form of the bill is based upon the evident impropriety of compelling a part of the defendants to answer and litigate matters in which they are not interested, and which are not so connected with matters in which they are interested as to render it proper for the convenient administration of justice to litigate and dispose of the whole in one suit. But the court of chancery abhors a useless multiplication of suits between the same parties, and endeavors to prevent it as far as practicable. For this reason the court will not allow separate bills to be filed for different parts of the same account between the same parties, although the account relates to transactions which are not necessarily connected with each other. Therefore, to sustain the objection that several distinct matters and causes of complaint between the same parties are improperly joined in the same bill, such matters must be of such different natures, or the forms of proceeding in relation to such several matters must be so different, that it would be improper or very inconvenient to litigate the same in one suit. For there is no such

¹ 1 Daniell, 437-451.

general principle in the court of chancery that distinct matters between the same parties, and who sue or are sued in the same capacity, cannot properly be united in the same bill. On the contrary, there are several cases in which it has been held that matters of the same nature and between the same parties, although arising out of distinct transactions, may be joined in the same suit."¹

§ 135. Same — Common point of litigation.— A bill in equity which presents a common point of litigation, in which all of the parties are interested, and the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit, is not multifarious, although the defendants have separate interests in distinct questions arising out of the suit.² Chancellor Kent laid it down as a rule that a bill may be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act.³ This decision of Chancellor Kent was approved by the court of errors of New York,⁴ and also by the supreme court of the United States in a well considered case, in which Blatchford, Justice, delivering the opinion of the court, said: "In *Binkershoff v. Brown*, 6 Johns. Ch. 139, it was held that a creditor's bill could be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act. The case there arose on a demurrer to the bill. It was urged that the bill was multifarious in uniting all the

¹ *Newland v. Rogers*, 3 Barb. Ch. 432-436.

² *Kelley v. Boettcher*, 85 Fed. R. 64; *Hayden v. Thompson*, 36 U. S. App. 361, 373, 17 C. C. A. 592, 598, and 71 Fed. R. 60, 67; *Chaffin v. Hull*, 39 Fed. R. 887; *Binkershoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cow. 682-702; *Prentice v. Storage Co.*, 19 U. S. App. 100, 107, 7 C. C. A. 293, 296, and 58 Fed. R. 437, 441; *Barcus v. Gates*, 89 Fed. R. 791;

Gaines v. Chew, 2 How. 619; *Curran v. Champion*, 85 Fed. R. 68, 70; *Pullman v. Stebbins*, 51 Fed. R. 10; *First Nat. Bank v. Moore*, 48 Fed. R. 799; *Northern Pacific R. Co. v. Walker*, 47 Fed. R. 681; *Chase v. Cannon*, 47 Fed. R. 674.

³ *Binkershoff v. Brown*, 6 Johns. Ch. 139.

⁴ *Fellows v. Fellows*, 4 Cow. 682, 702.

defendants and distinct and unconnected matters. Fraud was charged against the five trustees of the Genesee Company in confessing judgments and causing the property of the company to be sold. There was a charge of a combined fraud, affecting seven of the defendants, two of whom were not concerned in every part of the fraudulent conduct. All the acts sought to be impeached were alleged to have been done with a fraudulent intent as respected creditors. The court says: 'There was a series of acts on the part of persons concerned in this Genesee Company, all produced by the same fraudulent intent and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama; but it was still one piece—one entire performance—marked by different scenes; and the question now occurs, whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer.' The court then reviews the leading cases on the subject, and says that the principle to be deduced from them is 'that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct;' that the general right claimed by the bill was a due application of the capital of the company to the payment of the judgments of the plaintiffs; that the subject of the bill and of the relief, and the only matter in litigation, was the fraud charged in the creation, management and disposition of the capital of the company; that in that charge all the defendants were implicated, though in different degrees and proportions; and that the case fell within the reach of the principle stated and the demurrer could not be sustained."¹

§ 136. Same — No universal rule can be laid down.—It is impossible to lay down any rule of universal application as to what constitutes multifariousness. Every case not controlled by authority must be governed to some extent by its own circumstances, and the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no

¹ Graves v. Corbin, 132 U. S. 571-592.

interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests of each defendant may have arisen under separate and distinct contracts.¹ And the objection should always be taken by demurrer, and must be determined by the structure of the bill alone.²

§ 137. Same — Bill with a double aspect.— A bill with a double aspect may be filed where the plaintiff is in doubt whether he is entitled to one kind of relief or another upon the facts of the case stated in the bill; in which case his prayer should be framed in the alternative, so that, if the court decides against him as to one kind of relief prayed for, he may still obtain the proper relief under the other branch of his alternative prayer;³ but the title to relief must be precisely the same in each event.⁴ Where the case made by the bill entitles the plaintiff to one of two kinds of relief, or if it be doubtful whether the facts of the case entitle him to the specific relief prayed for, or to relief in some other form, and he inserts a prayer for general relief, the prayer of the bill should be in the disjunctive.⁵ And where the plaintiff is entitled to relief of some kind against the defendants, upon the facts stated in his bill, if the nature or kind of relief to which he is entitled depends upon the existence of a fact of which he is ignorant, he may allege his ignorance of such fact, and may frame his prayer for relief in the alternative, so as to obtain the appropriate relief according to the fact as it shall appear at the hearing of the cause.⁶ A bill may be filed with a double aspect as to the foundation and title of relief; thus, a person claiming the same property by different titles may assert them all in the same bill.⁷ In delivering the opinion of the court in one of the cases cited, Chief Justice Marshall said: "It may be admitted that two persons cannot unite two distinct titles

¹ *Gaines v. Chew*, 2 How. 619; *Oli-ver v. Piatt*, 3 How. 333; *Shields v. Thomas*, 18 How. 253.

² *Nelson v. Hill*, 5 How. 127; *Gaines v. Chew*, 2 How. 619.

³ *Lloyd v. Brewster*, 4 Paige Ch. 537; *Colton v. Ross*, 2 Paige Ch. 396; *McCosker v. Brady*, 1 Barb. Ch. 329.

⁴ *American Box Mach. Co. v. Cros-man*, 57 Fed. R. 1025.

⁵ *Colton v. Ross*, 2 Paige Ch. 396.

⁶ *Lloyd v. Brewster*, 4 Paige Ch. 537; *Colton v. Ross*, 2 Paige Ch. 396; *McCosker v. Brady*, 1 Barb. Ch. 329.

⁷ *Stephens v. McCargo*, 9 Wheat. 502; *Gaines v. Chew*, 2 How. 619.

in an original bill, though against the same person. Such a proceeding, if allowed, might be extended indefinitely, and might give such a complexity to chancery proceedings as would render them almost interminable. But we know of no principle which shall prevent a person claiming the same property by different titles from asserting all his titles in the same bill."¹ But the different titles for relief stated in the bill must be consistent, and must be the foundation for precisely the same relief.² A bill seeking, in the alternative, the specific performance or the rescission of a contract is demurrable.³

§ 138. The degree of certainty required in a bill in equity. The same strictness is not required in a bill in equity as in a declaration at common law.⁴ There are three kinds of certainty in pleadings at common law, applicable to different kinds and parts of the pleadings in a suit, viz.: (1) Certainty to a common intent, which is understood to mean "that when words are used which will bear a natural sense and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail; it is simply a rule of construction and not of addition; common intent cannot add to a sentence words which are omitted." (2) "Certainty to a certain intent in general is a greater degree of certainty than the last, and means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear, and is what is required in declarations, replications and indictments in the charge or accusation, and in returns to writs of *mandamus*." (3) "The third degree of certainty is that which precludes all argument, inference or presumption against the party pleading; and, as it has been well expressed, is that technical accuracy which is not liable to the most subtle and scrupulous objection, so that it is not merely a rule of construction, but of addition; for when this certainty is necessary the party must not only state the facts of his case, in the most precise way, but add to them such facts as show that they are not to be controverted."⁵ The second kind of certainty, or cer-

¹ *Stephens v. McCargo, supra.*

³ *Shields v. Barrow, supra.*

² *Shields v. Barrow*, 17 How. 130;

⁴ *Story's Eq. Pl.*, sec. 240.

Walker v. Powers, 104 U. S. 245.

⁵ *Chitty's Pl.* (9th Am. ed.) 233, 234.

tainty to a common intent in general, is the most that the rules of equity pleading ordinarily require in bills.¹

§ 139. Bills by stockholders.—An equity rule provides that “every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.”²

A bill in equity filed in a circuit court of the United States by a stockholder in a corporation against the corporation and its directors, founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, must aver: (1) Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred upon them by their charter or other source of organization; or (2) such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or (3) that the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of the other shareholders; or (4) that the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. And it must be averred in the bill (5) that the plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the

¹ Story's Eq. Pl. (10th ed.), sec. 240, and note 2.

² Equity Rule 94.

corporation; and (6) that he was the owner of the stock on which he claims the right to sue at the time of the transaction of which he complains, or that it has since devolved on him by operation of law; and (7) that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance.¹ But where the averments of the bill show that the acts complained of by the suing stockholder are of such a nature as to render an application for redress to the board of managing directors utterly useless and an idle ceremony, and that the immediate interposition and energetic interference of a court of equity are necessary to prevent the destruction of the corporation and its property rights, and the absorption of its assets by the unfaithful directors, then, in such cases, it has been held on the circuit and by the United States circuit court of appeals that it is not necessary to show a compliance with equity rule 94, by attempting to induce the officers and directors to grant the redress desired.²

(d) AMENDING THE ORIGINAL BILL.

§ 140. The original and amended bills are one record.—An amended bill is in fact a continuation of the original bill and forms a part of it, and the original and amended bills constitute but one pleading and but one record; so much so that, when an original bill is fully answered and amendments are afterward made, to which defendant does not answer, the whole record may be taken *pro confesso* generally.³ Inasmuch as all amendments to the original bill are always considered as incorporated in it and forming a part of it, the proper place to treat of amendments is, it would seem, in the chapter on the

¹ Hawes v. Contra Costa Water Co., 104 U. S. 450-462; Huntington v. Palmer, 104 U. S. 482; Bill v. Western Union Tel. Co., 16 Fed. R. 14.

² Phosphate Co. v. Brown, 74 Fed. R. 323; Ranger v. Cotton-Press Co., 52 Fed. R. 615; County of Tazwell v. Farmers' Loan & Trust Co., 12 Fed. R. 752; Heath v. Railway Co., 8 Blatchf. 347, Fed. Cas. No. 6,306; De

Neufville v. New York & N. Ry. Co., 81 Fed. R. 11; Rogers v. Nashville, Chattanooga & St. Louis Ry. Co., 62 U. S. App. 49.

³ 1 Daniell, 509; French v. Hay, 22 Wall. 246; Phosphate Co. v. Brown, 74 Fed. R. 323; Miller v. McIntyre, 6 Pet. 61; Hurd v. Everett, 1 Paige Ch. 124; Trust & Fire Ins. Co. v. Jenkins et al., 8 Paige Ch. 589.

original bill, and in immediate connection with that subject; such an arrangement is logical, as it brings together all that is said in regard to the preparation and perfecting of bills.

§ 141. The general purposes of amendments.—Amendments are allowed only when the bill is defective (1) in proper parties; (2) in its prayer for relief; (3) in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself; or (4) for putting in issue new matter to meet allegations in the answer.¹ “When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting the bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to plaintiff’s case, or parties which may be dispensed with, the same may be struck out; and the original bill, thus added to or altered, is termed an amended bill.”² “Amending the bill is useful for various purposes — for the correction of mistakes; or for the suppression of impolitic admissions in the original statements; or for adding new parties; or for inquiring into additional facts; or for the further investigation of facts which have been only partially disclosed; or for putting in issue new matter stated in the answer.”³ The bill may be amended in relation to parties by the transposition or changing the situation of parties. The name of a co-plaintiff may be struck out and he made a defendant in the bill.⁴ The transposition of parties is frequently allowed by amendment in the circuit courts of the United States in order to avoid ousting the jurisdiction of the court.⁵ Where a matter has not been put in issue by the bill with sufficient precision, or the prayer is not consistent with

¹ *Shields v. Barrow*, 17 How. 130;
Lyon v. Tallmadge, 1 Johns. Ch. 184.

² 1 Daniell, 508.

³ *Gresley’s Eq. Ev.* 21, 22; *Story*,
Eq. Pl., sec. 884.

⁴ 1 Daniell, 510.

⁵ *Insurance Co. of North America*
v. Svendsen, 74 Fed. R. 348, 349; *Con-*
nolly v. Taylor, 2 Pet. 564.

the case made by the bill, the court will at the hearing give the plaintiff liberty to amend the bill for the purpose of making the necessary alteration in its averments, and will permit the prayer of the bill to be amended so as to make it more consistent with the case made by the plaintiff than the one he has already introduced.¹

§ 142. The federal statute of amendments and jeofails.—

The thirty-second section of the original judiciary act, as revised, provides: That "no summons, writ, declaration, return, process, judgment, or other proceedings in a civil cause, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."² The power of the court to permit at any time either of the parties to amend their pleadings in equity suits is expressly conferred by this statute.³ In a recent case before the circuit court of the northern district of Ohio, Judge Hammond, construing this statute, said: "As I have repeatedly said in many judicial judgments, the federal statute of amendments is the most liberal and imperative since the ancient and beneficent statute of jeofails. It commands that the court may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe. This applies to defects appearing on an application for preliminary injunction, as well as to any other hearing, both in its letter and spirit of liberality indicated by this and the other provisions of the statute. The court may use its discretion as to the conditions imposed, and

¹ *Graffman v. Burgess*, 117 U. S. 180.

³ *Hunt v. Rousmaniere*, 2 Mason,

² 1 U. S. Stat. at L., ch. 20, secs. 32, 342, Fed. Cas. No. 6,898.

91; U. S. R. S., sec. 954.

prescribe rules to that end; but I doubt if it may ever refuse to receive an amendment, and thereby annul the statute, which permits the parties to amend 'at any time' upon compliance with such conditions as the rules prescribe. Following both the letter and spirit of the statute, which is as old as the courts themselves, our equity rules regulate the practice of amendments with great particularity."¹

§ 143. Same — Time within which amendments may be allowed.—Courts of equity have inherent power to allow amendments, and to adapt the pleadings and proceedings to the exigency of each particular case, for the effectual attainment of justice between the parties litigant before them.² But in the High Court of Chancery of England, from which our system is derived, there were many restrictions as to the time within which certain kinds of amendments could be made.³ The statute above quoted has removed those restrictions from the power to allow amendments in suits in equity in the courts of the United States, and the court "may at any time permit either of the parties to amend any defect in the process or pleading."⁴ The court has power to grant amendments of the pleadings after the cause has been heard and before the decree is passed.⁵ In a case decided by the supreme court of the United States, the opinion of the court, after stating that the trial court, after the cause had been heard, of its own motion gave the plaintiffs leave to amend their bill on the payment of costs, proceeds: "It is insisted that the proceeding is erroneous; that after a cause has been heard the power of allowing amendments ceases; or, if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill and make an entirely new case, although on the same subject-matter, as, it is contended, was done in this instance under the leave to amend.

"This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before de-

¹ American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union, 90 Fed. R. 599, 600.

² Story, Eq. Pl., sec. 883; Hardin v. Boyd, 113 U. S. 761; Neale v. Neale, 76 U. S. 1, 12; 1 Daniell, 508-515.

³ Story, Eq. Pl., secs. 332, 886, 887, 889; 1 Daniell, 544-546.

⁴ U. S. R. S., sec. 954.

⁵ Neale v. Neale, 76 U. S. 1, 12.

cree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case; but this power would very often be ineffectual for the purpose unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power, and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities.

“Necessarily, in a federal tribunal the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point.”¹ An amendment to a bill in equity may be allowed and made after final decree where the cause was tried upon the theory that the original bill contained the averment inserted by the amendment.² Upon reversing and remanding a cause, where there is a defect in the pleadings, it is the practice for the appellate court to direct the lower court to permit the plaintiff to amend his bill.³

§ 144. Amendments of course before demurrer, plea or answer filed.—An equity rule provides that “the plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk’s office, and in any small matters afterwards, such as filling blanks, correcting errors of

¹ Neale v. Neale, *supra*.

² Tremaine v. Hitchcock, 23 Wall. 518.

³ Thompson v. Maxwell Land Grant & R. Co., 95 U. S. 391; Harrison v. Nixon, 9 Pet. 483; Everhart v. Hunts-

ville College, 120 U. S. 223, 7 Sup. Ct. 555; King Bridge Co. v. Otoe Co., 120 U. S. 225, 7 Sup. Ct. 552; Metcalf v. Watertown, 128 U. S. 590, 9 Sup. Ct. 173; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873.

dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.”¹ Although the plaintiff may, under this rule, amend his bill as of course, yet an order allowing the amendment must be regularly drawn and entered on the order book before the amendment is filed.²

§ 145. Amendments after demurrer, plea or answer filed.

An equity rule provides that, “after an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct.”³ Amendments regularly made under this rule cannot be avoided by a motion to strike from the record or set aside the order allowing them; the bill being properly amended according to the authorized equity procedure, the defendants are required to plead, answer or demur thereto.⁴ Applications to amend bills are most frequently made under this provision of the rule, for the purpose of meeting new matter alleged in the plea or answer of the defendant,⁵ as will be fully hereafter explained.

§ 146. Amendments after demurrer or plea allowed.—

According to the English practice the plaintiff might after

¹ Equity Rule 28; Insurance Co. of North America v. Svendsen, 74 Fed. R. 347. Johns. Ch. 171; Partridge v. Haycraft, 11 Ves. 577.

³ Equity Rule 29.

² Atterberry v. Gill, 2 Flip. 239, Fed. Cas. No. 638; Luce v. Graham, 4 ⁴ Lichtenaver v. Cheney, 8 Fed. R. 876.

⁵ Equity Rule 45.

demurrer filed and set down for argument, and before the demurrer was allowed, obtain leave to amend his bill;¹ but after a demurrer to the whole bill was allowed the bill was considered completely out of court, and the plaintiff could not then obtain leave to amend his bill; and where upon argument of the demurrer the court was of opinion that the objections to the bill could be removed by amendment, it would, in order to avoid putting the plaintiff to the expense of filing a new bill, instead of deciding upon the demurrer give the plaintiff liberty to amend his bill on payment of the costs incurred by the defendant.² In the circuit courts of the United States this subject is controlled by an equity rule which provides that: "If upon the hearing any demurrer or plea shall be allowed the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable."³ The plaintiff is not entitled as a matter of right to amend his bill after a demurrer thereto has been sustained; the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice; and the court may grant the plaintiff leave to amend his bill upon such terms as it shall deem reasonable.⁴ An order refusing a plaintiff the privilege of amending his bill after demurrer thereto has been sustained cannot be reviewed by the supreme court on appeal, unless the record shows what amendment the plaintiff offered to make.⁵

§ 147. Amendment after replication filed.—An equity rule provides that: "After replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner intro-

¹ 1 Daniell, 524; Story, Eq. Pl., sec. 891.

² 1 Daniell, 521, 522.

³ Equity Rule 35; Hunt v. Rousmaniere, 2 Mason, 342, Fed. Cas. No. 6,898; U. S. R. S., sec. 954.

⁴ National Bank v. Carpenter, 101 U. S. 567; Hunt v. Rousmaniere, 2 Mason, 342, Fed. Cas. No. 6,898; Dwell v. Applegate, 8 Fed. R. 698.

⁵ National Bank v. Carpenter, 101 U. S. 567.

duced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause."¹ This part of the rule is almost a literal copy of the fifteenth of the English orders of April, 1831.² No material amendment going to the merits of the bill can be allowed while the replication remains, and therefore the replication must be withdrawn before the amendment can be made; and the materiality of the proposed amendment must be shown, and it must further appear that it could not with reasonable diligence have been sooner introduced in the bill; and copies of the affidavits supporting the application to amend must be served on the defendant's counsel with notice of the application.³ The reason why the replication must be withdrawn before the bill can be amended in a material matter is: that when a plaintiff so amends his bill, the defendant has the right to plead, answer or demur thereto, as if it were an original bill, no matter what may have been the state of the pleadings before the amendment was made, and may make an entire new defense contradicting his original answer, if he desires so to do.⁴ And one of our equity rules provides that: "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next rule-day after that on which the amendment is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer."⁵ In all cases where the replication is withdrawn, and the bill amended, and the amendment is answered by the defendant, the plaintiff should file a new replication within the time allowed by the rules and practice of the court for filing replication in the first instance,⁶ which in the circuit courts of the United States is on the next rule-day after the answer "shall be adjudged or deemed sufficient;" and if the plaintiff fails to file a new replication

¹ Equity Rule 29.

² Smith's Chan. Prac. 445; 1 Daniell, 546.

³ Brown v. Ricketts, 2 Johns. Ch. 425; Thorn v. Germand, 4 Johns. Ch. 364; 1 Daniell, 545, 546.

⁴ Nelson v. Eaton, 66 Fed. R. 377, 378; Davis v. Davis, 62 Miss. 818;

Trust & Fire Insurance Co. v. Jenkins, 8 Paige Ch. 589; Richardson v. Richardson, 5 Paige Ch. 58; Miller v. Whittaker, 33 Ill. 387; 1 Daniell, 544, 545, 546, 547.

⁵ Equity Rules 18, 19, 46.

⁶ Trust & Fire Insurance Co. v. Jenkins, 8 Paige Ch. 589.

within the time allowed, "the defendant shall be entitled to an order, as of course, for a dismissal of the suit."¹ A defendant may not only answer an amended bill, but he may defend himself from the effects of the amendments by demurrer or plea.²

§ 148. Same—Form of averment in bill stating pretense of defendant.—The common form of averment, setting up the pretenses of the defendant, whether contained in the original draft of the bill in anticipation of the defense, or set up by amendment to meet the new matter brought forward in the plea or answer of defendant, is substantially as follows: That the defendant alleges and pretends (then state the claims of defendant), and at other times he alleges and pretends (then state other claims of defendant); whereas your orator charges the truth to be (then state the claim of the plaintiff in reply to, or in avoidance of, defendant's pretenses). Or this form: That defendant alleges and pretends, contrary to the truth (then state the pretenses of defendant), but the plaintiff alleges the truth in this regard to be (then state the claims of plaintiff in reply to, or in avoidance of, the pretenses of the defendant).³ Where an amended bill is filed for the purpose of meeting, avoiding or further developing new matter set up in the plea or answer of defendant, the amended bill should state, by way of pretense, the substance of the new matter contained in the plea or answer, and then proceed by proper averment to traverse or avoid it, and, if the circumstances require it, call upon the defendant to answer the amended bill, and to set forth the time, place and other circumstances under which the pretended facts happened.⁴

§ 149. Amendments to put in issue new matter contained in defendant's plea or answer.—An equity rule provides that: "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without payment of costs, as the court, or a

¹ Equity Rule 66.

² 1 Daniell, 550.

³ Barton's Suit in Equity, 34; Van Heythuysen's Equity Draftsman, 15.

⁴ 1 Barbour's Ch. Prac. 250; Storms

v. Storms, 1 Edw. Ch. 358; Spencer

v. Van Duzen, 1 Paige, 555; Dupont

v. Mussy, 4 Wash. 128, Fed. Cas. No.

4,185; Brooks v. Stolley, 4 McLean,

275, Fed. Cas. No. 1,936.

judge thereof, may in his discretion direct.”¹ According to the ancient practice of the High Court of Chancery of England, if defendant, by his plea or answer, alleged new matter by way of defense, the plaintiff, following the analogy of pleadings at common law, filed a special replication to the new matter contained in the defendant’s plea or answer; but such special pleading was found in practice to be unsuited to the administration of equitable remedies, and was discontinued. As a substitute for special replications, the charging part of the bill was introduced, which might be inserted in the original draft of the bill, or afterwards by amendment, in which the plaintiff alleged that defendant pretended or set up certain matters or pretenses by way of defense, and then averred other facts in avoidance of the defense. The equity rule just quoted is declaratory of a rule of equity pleading then already fully established both in England and the United States, though special replications in equity were occasionally allowed by special order of the court. But since the adoption of the rule referred to, the universal practice in the circuit courts of the United States is that: When the defendant, in his plea or answer, sets up new matter, and the plaintiff desires to put that new matter in issue, or to avoid it, or to explain it, he must do it by amending the charging part of his bill; that is, the plaintiff must set up in an amended bill, “by way of pretense,” the new matters set up by defendant in his plea or answer, as a defense, and meet them by counter averments or avoid them, or explain them. The amended bill, under the modern practice, performs precisely the same functions which a special replication performed under the old practice.² One of the authorities cited states the rule as follows: “Formerly if defendant, by his plea or answer, offered new matter by way of defense, the complainant replied specially to the new matter; but latterly the use of a special replication has been dis-

¹ Equity Rule 45.

² Brooks v. Stolley, 4 McLean, 275, Fed. Cas. No. 1,963; Duponti v. Mussy, 4 Wash. 128, Fed. Cas. No. 4,185; Shields v. Barrow, 17 How. 130; Marsteller v. McLean, 7 Cranch, 156; Vattier v. Hinde, 7 Pet. 252; Piatt v. Vattier, 9 Pet. 405; Taylor v. Bren-

ham, 5 How. 233; Storms v. Storms, 1 Ed. Ch. 358; Spencer v. Van Duzen, 1 Paige Ch. 555; Weed v. Smull, 7 Paige Ch. 573; 1 Daniell, 484; 2 Daniell, 387, 388; Redesdale (6th Am. ed.), 382, 383, 384; 1 Barbour’s Ch. Prac. 250; Story’s Eq. Pl., secs. 676, 678, 878, 884, 885, 887.

continued. And if the complainant wants to avoid the effect of the matter pleaded in bar, his proper course is to apply to amend the charging part of his bill. This charging part, containing the alleged pretenses of defendant, and the complainant's denial of them, amounts, virtually, to a special replication."¹ When the plaintiff files a bill for a general accounting, and the defendant pleads in bar of the suit a stated account, if the plaintiff wishes to show at the hearing there are errors in the stated account, he must amend his bill and show in what particulars the account is incorrect, or he will not be permitted to offer proof on the point.² If the plaintiff wishes to obtain the details of any new matter set up by way of defense, or, in other words, if he wishes to obtain from defendant discovery in regard to such new matter, he should amend his bill and state it by way of pretense, and call upon the defendant to answer as to the particulars thereof.³ A bill filed to restrain infringement of a patent contained the averments that defendant was using the patented machine without authority, and that a license which defendant had to use the machine had become void and abandoned, by reason of the acts of defendant, but the bill did not state what the acts were. The defendant in his answer denied the allegations of the bill, and set up a license in bar of the suit; the plaintiff filed the general replication to the answer. At the hearing it was held that the plaintiff had not laid any foundation for evidence of abandonment, but that, under equity rule 45, the plaintiff must amend his bill and allege the facts of abandonment, before proof of abandonment could be made.⁴ Inasmuch as the plaintiff cannot definitely know what new matter will be interposed by defendant as a defense to the suit until the coming in of the answer, or the filing of a plea, it is the more judicious practice not to attempt to introduce the pretenses of the defendant in the original draft of the bill, but to introduce them by amendment of the bill, after the defense has been actually filed. "Charges of this class are sometimes made in anticipation of an expected defense, but they are also introduced by

¹ 1 Barbour's Ch. Prac. 250.

² Weed v. Smull, 7 Paige Ch. 573.

³ Spencer v. Van Duzen, 1 Paige Ch. 555.

⁴ Brooks v. Stolley, 4 McLean, 275, Fed. Cas. No. 1,963.

amendment to meet a defense set up by the answer; and the latter is generally the safer course, because, by attempting to anticipate the defense, a risk is incurred of misunderstanding its purport, and of sometimes suggesting an objection which the defendant would otherwise have overlooked."¹ Under the United States equity rules the plaintiff is entitled, as a matter of right, to amend his bill to meet the defensive matter set up in the plea or answer, and may obtain leave so to do, without notice to defendant, if the application be made before replication is filed.³

§ 150. What matter may be introduced by amendment.—

It is a well settled rule of equity pleading that nothing can be introduced or inserted in an original bill by way of amendment which has arisen subsequently to the commencement of the suit; but the plaintiff may amend his bill by introducing any new facts which had occurred at the time the original bill was filed, which he, though apprised of their existence, did not think necessary to be stated, or the existence of which he has discovered since the commencement of the suit.³ The reason of the rule is that amendments, when allowed, are always considered as incorporated in and as forming part of the original bill; the amendments and the original bill constitute one record; the amendments, in contemplation of law, bear the same date as the original, and relate to facts which existed when the original bill was filed; and it would be inconsistent, incongruous, and irregular to introduce by amendment any facts which have occurred since the filing of the original bill.⁴ Matters which arise subsequently to the filing of the original bill should be introduced by supplemental bill.⁵ To the rule just stated there are some exceptions. Where a plaintiff has an inchoate right at the time the bill is filed, which requires some formal act to make the right perfect, and such formal act is performed after the bill is filed, the fact may be set up by amendment. An executor of a will may file a bill as such executor before

¹ Adams' Eq. 303.

² Equity Rules 29, 45.

³ 1 Daniell, 508, 509, 510; 1 Smith's Ch. Pr. 293; Stafford v. Howlett, 1 Paige Ch. 200.

⁴ 1 Daniell, 510, 511; 1 Smith's Ch.

Pr. 293; Hurd v. Everett, 1 Paige Ch. 124.

⁵ Stafford v. Howlett, 1 Paige Ch. 200; 1 Daniell, 510, 511; 1 Smith's Ch. Pr. 293.

probate, and afterwards obtain probate and grant of letters, and set up the fact by amendment;¹ and an administrator or executor appointed in one state may file a bill in the courts of another state, and may afterwards prove the will or take out letters of administration in the latter state, and, having obtained letters, may aver the fact by amendment after demurrer and before answer filed.² A bill may be amended by adding new matter which has occurred after the bill was filed and before the defendant has put in his answer.³

§ 151. Amendment as to parties.—By an equity rule it is provided that: "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say): Set down upon the defendant's objection for want of parties. And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."⁴ And another equity rule provides that: "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties."⁵ These two rules are literal copies of the thirty-ninth and fortieth of the English chancery orders of August, 1841. Where an objection for the want of a party, whose interest may be affected by a decree, is sustained at the final hearing of the cause, the court, instead

¹ 1 Daniell, 511.

³ Henry v. Traveller's Ins. Co., 45

² Black v. Henry C. Allen Co., 42 Fed. R. 302; Story's Eq. PL, sec. 885.

Fed. R. 623, 624, 625; Buck v. Buck, 11 Paige Ch. 170; Swatzel v. Arnold,

⁴ Equity Rule 52.

⁵ Equity Rule 53.

1 Woolw. 383, Fed. Cas. No. 13,682.

of dismissing the bill, will retain the cause, and give the plaintiff leave to amend his bill and make such person a party.¹ Even after a case has been heard and an appeal taken to the supreme court, if there is merit in the cause, and it appears that the plaintiff is entitled to relief, but no decree can be properly made for the want of proper parties, the appellate court will reverse and remand the cause, with directions to the lower court to allow the bill amended to make them parties.² After publication has been passed, and the cause set down for hearing, the court will allow the bill amended by the simple addition of parties, without withdrawing the replication; but the cause must in such case be tried as to the new parties upon bill and answer alone.³

§ 152. When applications for amending bills may be presented.—The petition or application for leave to amend may be presented to a judge of the court on any day, either in or out of term time; this was the English rule.⁴ It is provided by a federal statute and also by the equity rules that the circuit courts as courts of equity shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules and other proceedings preparatory to hearing of all causes upon their merits. And that any judge of a circuit court may, upon reasonable notice to the parties, make and direct and award at chambers or in the clerk's office on rule-days, and in vacation as well as in term time, all such interlocutory orders, rules and other proceedings and process and commissions preparatory to hearing all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term.⁵ The powers above enumerated certainly embrace the power to allow the amendment of bills; and it is the constant practice of the judges to make such orders upon any day in vacation. The application should be in writ-

¹ Winter v. Ludlow, 3 Phila. 464, Fed. Cas. No. 17,891; Town Savings Bank of New Haven v. Epping, 3 Woods, 390, Fed. Cas. No. 14,120.

² Lewis v. Darling, 16 How. 1.

³ 1 Daniell, 544, 545; Hutchinson v. Reed, Hoff. Ch. 316.

⁴ 1 Smith's Chan. Prac. 295.

⁵ Equity Rules 1, 3; U. S. R. S., sec. 638.

ing in the form of a petition or motion;¹ and the order when made out of term time should be entered upon the order book.²

§ 153. How amendments are made.—If the amendment is for the purpose of omitting or suppressing averments contained in the original bill, it is done by striking the same through with a pen. In small matters, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises and the addition of short averments, the amendments are to be made by interlineations in the original bill. But if the amendments are so extensive that they cannot be interlined upon the record, or are so considerable as to blot and deface it, then the amendments should be separately engrossed and annexed to the original record.³ The observation made by Lord Chancellor Manners and followed by Chancellor Kent is that “the rule with respect to amended bills was that if there be not much new matter to be introduced it is done by interpolation; if much, it must be done on another engrossment to be annexed to the bill in order to preserve the record from being defaced.”⁴

¹ Equity Rule 29.

² Equity Rule 4.

³ 1 Daniell, 547, 548; 1 Smith's Chan. Prac. 297; Equity Rule 28.

⁴ Luce v. Graham, 4 Johns. Ch. 170.

CHAPTER VII.

FILING THE ORIGINAL BILL—ISSUING AND SERVICE OF SUBPOENA—APPEARANCE OF DEFENDANT.

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| § 154. Filing the original bill. | § 159. Exemptions from service of subpoenas. |
| 155. Issuing the subpoena. | 160. Return of the subpoena. |
| 156. Service of the subpoena — By whom served. | 161. When defendant must enter his appearance. |
| 157. Substituted service in ancillary suits. | 162. General and special appearances. |
| 158. Service on non-resident defendants in suits <i>in rem</i> . | |

§ 154. **Filing the original bill.**—The rules of procedure in the High Court of Chancery of England required that after the original bill had been drawn and signed by counsel, and fairly engrossed upon parchment, it should be carried to the six clerks' office and delivered to one of the six clerks, who first entered it in his bill book, and then filed it, dating the filing on the same day the bill was carried into the office; and by special order it was directed "that no bill, answer or other pleading shall be said to be of record, or to be of any effect in court, until the same shall be filed with such of the six clerks with whom it ought to remain."¹ The same rules and principles, substantially, obtain in suits in equity in the circuit courts of the United States. After the original bill has been prepared, and signed by counsel, it should be carried to the clerk's office and delivered to the clerk or his deputy, and he should mark it filed and date the filing on the same day it is carried into his office,² and should number the bill and make an entry of the fact in his order book, showing the names of the plaintiffs and defendants, the number of the case, and the date on which the bill was filed, and should sign and date the entry;³ and "upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."⁴

¹ 1 Daniell, 507, 508.

² Equity Rule 11.

³ Equity Rule 4.

⁴ Equity Rule 16.

§ 155. Issuing the subpoena.—An equity rule provides that: “Whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk’s office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk’s office on or before the day at which the writ is returnable, otherwise the bill will be taken *pro confesso*. Where there are more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.”¹ And a federal statute provides that when a state contains more than one district, and there are two or more defendants residing in different districts of the state, the clerk shall issue a duplicate writ of subpoena against the defendants, directed to the marshal of any other district in which any defendant may reside, and shall indorse thereon that it is a true copy of a writ sued out of the court in the district where the suit is filed.² And another equity rule provides that: “Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against each defendant, if he shall require it, until due service is made.”³ The rule first quoted in this section contemplates that the plaintiff should make formal application to the clerk for the issuance of the subpoena; and the application should be in writing and signed by the counsel or solicitor of the plaintiff, and filed with the papers in the cause; the plaintiff is entitled to elect upon what rule-day the subpoena shall be returnable, and whether there shall be a separate subpoena issued for each defendant or a joint subpoena against all the defendants; and, in order to prevent mistake and to protect the clerk in carrying out the instructions of plaintiff’s counsel, the application for the subpoena should be made a matter of record. Under the ancient English practice, in order to obtain the issuance of the subpoena, the plaintiff’s clerk in

¹ Equity Rule 12.² U. S. R. S., sec. 740.³ Equity Rule 14.

court was required to file in the subpoena office a *præcipe* or subpoena note, signed by him, which was the authority upon which the subpoena was made out and sealed.¹ Where a bill is amended it is not necessary to issue new process on the amended bill against the defendants who are already before the court; being in court they have notice of the amendment and are subject to the orders of the court, and are bound to take notice of the filing of the amended bill as well as any other proceeding in the case.² And when a supplemental bill is filed a new subpoena is not required, unless new parties are made by the supplemental bill.³

§ 156. Service of the subpoena—By whom served.—An equity rule provides that: “The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.”⁴ And the federal statutes provide that: “It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty;”⁵ and that “every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office;”⁶ and “when the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.”⁷

An equity rule provides that: “The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy

¹ Daniell, 560.

² Longworth v. Taylor, 1 McLean, 514, Fed. Cas. No. 8,491; Taylor v. Longworth, 14 Pet. 172; French v. Stewart, 22 Wall. 247.

³ Shaw v. Bill, 95 U. S. 10.

⁴ Equity Rule 15.

⁵ U. S. R. S., sec. 787.

⁶ U. S. R. S., sec. 790.

⁷ U. S. R. S., sec. 922.

thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident in the family.”¹ Where the husband and wife are sued together, service cannot be made on the wife by delivering a copy of the subpoena to the husband for her, but the rule requires personal service on each defendant by delivery to him of a copy, or that a copy for each defendant be left at his or her dwelling-house or usual place of abode with some adult person who is a member or resident in the family.² Infant defendants are served with the subpoena in the same manner that adult defendants are served.³ Service is made upon corporations by service upon their officers or agents.⁴ Where a particular method of serving process is pointed out by statute, that method must be followed; and this rule is especially exacting in reference to corporations; and when the statute designates a particular officer upon whom process may be served, no other officer or person can be substituted.⁵ Depositing a process in a place provided or designated by the proper officer of a corporation is equivalent to a manual delivery to him.⁶ In all cases in which a personal liability is sought to be enforced by judicial proceedings and after written notice, the notice must be personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient.⁷ It is a principle of the common law that no court can exercise jurisdiction over a party unless he is served with process within the territorial jurisdiction of the court, or voluntarily appears.⁸ In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state; and if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an

¹ Equity Rule 13.

² O'Hara v. McConnell, 93 U. S. 150.

³ 1 Daniell, 229, 563; Equity Rule 13; O'Hara v. McConnell, 93 U. S. 150.

⁴ St. Clair v. Cox, 106 U. S. 350, 359; Re Hhorst, 150 U. S. 653.

⁵ Amy v. Watertown, 130 U. S. 301.

⁶ Michigan Ins. Bank v. Eldred, 130 U. S. 693.

⁷ Wilson v. Seligman, 144 U. S. 41, 47; Pennoyer v. Neff, 95 U. S. 714.

⁸ Mexican C. R. Co. v. Pinkney, 149 U. S. 194.

agent to receive such process in behalf of the corporation; an express authority to receive process is not always necessary.¹

§ 157. Substituted service in ancillary suits.—In ancillary or dependent suits in equity in the circuit courts of the United States, such as bills to enjoin the execution of judgments at law obtained in the same court, cross-bills and other bills of a purely dependent and ancillary character, the subpoena issued upon such bills to defendants therein who are parties to the principal or original suit is not regarded as an original process or proceeding, and is not controlled by equity rule 13; and such subpoena may be served upon the defendants in the ancillary bill who are parties to the principal suit, by service upon their attorneys and counsel of record in the principal suit, or upon the party himself outside of the district where the litigation is pending. Thus, in a bill filed in the circuit court of the United States to enjoin the execution of a judgment at law obtained in the same court, the subpoena issued upon the injunction bill may be served upon the plaintiff in the action at law by service upon his attorney of record in that action, or it may be served upon the party himself outside of the district where the litigation is pending, and may be served by the marshal of any district where he may be found. In all other suits in equity of a purely dependent and ancillary character, as defined by the adjudicated cases of the federal courts, the parties to the original litigation may be served with the subpoena issued upon the dependent bill, in the same manner as is allowed in bills to enjoin judgments at law. But before such service can be made, it must be authorized by an order of the court previously obtained, directing it, and ordering that it shall “be deemed good service;” such an order is obtained by written motion or petition, stating the facts which authorized it, and supported by affidavit.² In one of the cases cited, Justice Mil-

¹ *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 610.

² *Jones v. Anderson*, 10 Wall. 327; *Freeman v. Howe*, 24 How. 450; *Logan v. Patrick*, 5 Cranch, 288; *Dunn v. Clark*, 8 Pet. 1; *The Cortes Co. v. Tannhauser*, 9 Fed. R. 226; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164; *Clark v. Matthewson*, 12 Pet. 164; *Bank v. Leland*, Fed. Cas. No. 9,452; *Abraham v. North German Fire Ins. Co.*, 37 Fed. R. 731; *Gregory v. Pike*, 29 Fed. R. 588; *Hatch v. Dorr*, 4 McLean, 112, Fed. Cas. No. 6,206; *Babcock v. Millard*, Fed. Cas. No. 699; *Thompson v. Mc-*

ler of the United States supreme court said: "The question is not whether the proceeding is supplementary and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplementary and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state. No one would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law."¹

§ 158. Service on non-resident defendants in suits in rem.

In suits in equity in the circuit courts of the United States "to enforce any legal or equitable lien upon or claim to or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where the suit is brought," the procedure for service of notice upon non-resident defendants is prescribed and controlled by section 8, chapter 137, act of March 3, 1875, which was continued in force by act of March 3, 1887, as corrected by act of August 13, 1888,² and which is quoted in full and the decisions thereon discussed in a former chapter of this work, to which the reader is referred.³

There is in the decisions some contrariety of opinion as to the details of the exact procedure to be followed in such cases,⁴ and in view of these differences it is submitted that the following procedure would be the safer, as conforming to the most

Reynolds, 29 Fed. R. 657; Lamb v. Fed. Cas. No. 7,604; 1 Daniell, 263. Ewing, 54 Fed. R. 272; Webb v. Barnwall, 116 U. S. 197; Milwaukee, etc. See *ante*, § 46.

¹ 2 Wall. 609, 645, *supra*.

R. Co. v. Soutter, 2 Wall. 609, 645; ² 18 U. S. Stat. at L., ch. 137, sec. 8, p. 470; Greely v. Low, 153 U. S. 58, 76.

Read v. Consequa, 4 Wash. 174, Fed. ³ *Ante*, §§ 46, 47, 48.

Cas. No. 11,606; Segree v. Thomas, 3 ⁴ Bronson v. Keokuk, 2 Dill. 498, Blatchf. 11, Fed. Cas. No. 12,633; Fed. Cas. No. 1,929; Forsyth v. Pier- Kamm v. Stark, 1 Sawy. 547, 550, son, 9 Fed. R. 801.

rigid rules laid down by any of the adjudicated cases, namely: (1) The citizenship and residence of the non-resident defendant should be averred in the bill, if they can be ascertained, and if they cannot be ascertained that fact should be averred in the bill, which allegations should be verified by affidavit; but it is recognized as proper practice to show these facts by separate affidavit filed with the papers in the cause. (2) The bill should be filed and subpoena regularly issued to the marshal of the district where the suit is brought for the absent defendant, and returned not found by the marshal; and then no further proceeding should be taken against such defendant until the next term of the court, in order to give him an opportunity to voluntarily appear and enter his appearance in the suit. (3) At the next term of the court after the return of the subpoena not found, if the defendant has not voluntarily appeared, the plaintiff should make application to the court in term for, and obtain from it, an order directing such absent defendant to appear in said suit and plead, answer or demur therein by a day certain to be in said order designated, and which need not be a rule-day; the order should contain a provision that the same shall be served on the absent defendant, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; the application for the order should state the facts which, under the statute, authorize the making of the order and should be verified by affidavit, and the order should direct the mode of service, which should be by the delivery of a copy to the defendant in person, and should also direct by whom the order should be served, which should, if practicable, be made by the marshal of the district where the service is to be made. The order should direct that a writ of execution in chancery, or precept, should issue, directed to the marshal who is to serve the order, commanding him to serve the same; and it should in like manner direct the marshal of the district where the suit is brought to serve a copy upon the persons in possession or charge of the property. The clerk of the court should issue certified copies of the order with precepts to serve them, directed to the proper marshals. (4) The marshal should make service of the order as directed, and make return thereof in the usual form, or by affidavit stating his action. (5) If the return of the marshal

shows that personal service has not been made of the order, and such service is not practicable, then such fact should be made to appear to the court by a written application supported by affidavit, and another order obtained for constructive service upon the absent defendant, directing him to appear and plead, answer or demur by a day certain to be designated in the last order, and directing such order to be published in such manner as the court may deem proper, not less than once a week for six consecutive weeks. (6) The order should be published for the full period required by the order and the statute, and proof of publication made and filed in the cause and entered upon the order book. (7) No personal decree should be taken against non-resident defendants not appearing.¹

§ 159. Exemptions from service of subpœna.—The federal constitution provides that the senators and representatives “shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.”² Under this provision it has been held that a member of the house of congress is exempt from service of process, although not accompanied with arrest of the person, while on his way to attend a session of congress; and that while the privilege is limited to a reasonable time to make the journey, yet it is not strictly confined to the exact number of days required for that purpose, nor will the privilege be forfeited by a slight deviation from the most direct route.³ Independently of any statutory or constitutional provision, a non-resident coming within a state for the purpose of there prosecuting or defending a suit in a state or federal court to which he is a party, or for the purpose of giving his testimony before a commissioner, examiner or master in chancery in such suit, cannot, while in good faith attending to such duties, nor during the time fairly occupied in going to and returning from

¹ *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928; *Forsyth v. Pier-son*, 9 Fed. R. 801; *Batt v. Proctor*, 45 Fed. R. 515; *Meyer v. Kuhn*, 65 Fed. R. 712; *Guaranty Trust & Safe Deposit Co. v. Green Cave Springs & Melrose R. Co.*, 139 U. S. 137, 151;

Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 371; *Goodman v. Niblack*, 102 U. S. 556; *Greely v. Low*, 155 U. S. 58, 76.

² Const., art. 1, sec. 6.

³ *Miner v. Markham*, 28 Fed. R. 387.

the place where such duties are to be performed, be legally served with process in another suit;¹ and witnesses are entitled to a like exemption.² If a person be induced by a fraudulent device, trick or artifice, or by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served upon him, it is such an abuse that the court will, on motion, set the process aside.³ If a person illegally served with process desires to claim the privilege of exemption from such service, he should make a special and limited appearance for the purpose of moving to quash or set aside the process;⁴ and if the motion to set aside the process be overruled, the defendant does not waive the illegality of the service by afterwards pleading to the merits of the case.⁵ In the case cited, Field, Justice, said: "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."⁶

¹ *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *Brooks v. Farwell*, 4 Fed. R. 167; *Bridges v. Sheldon*, 7 Fed. R. 17; *United States v. Bridgman*, Fed. Cas. No. 14,645.

² *Larned v. Griffin*, 12 Fed. R. 590; *Matthews v. Puffer*, 10 Fed. R. 606; *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323; *Atchison v. Morris*, 11 Fed. R. 582; *Kauffman v. Kennedy*, 25 Fed. R. 785.

³ *Fitzgerald & Mallory Const. Co.*

v. Fitzgerald, 137 U. S. 98, 113; *Steiger v. Bonn*, 4 Fed. R. 17; *Blair v. Turtle*, 5 Fed. R. 394; *Union Sugar Refinery v. Matthewson*, 2 Cliff. 309, Fed. Cas. No. 14,397.

⁴ *Harkness v. Hyde*, 98 U. S. 476; *Atchison v. Morris*, 11 Fed. R. 582; *Miner v. Markham*, 28 Fed. R. 390, 395; *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323.

⁵ *Harkness v. Hyde*, 98 U. S. 476, 479; *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323.

⁶ *Harkness v. Hyde*, *supra*.

§ 160. Return of the subpoena.—The subpoena shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of issuing thereof,¹ and must be served on the defendant twenty days before the return-day.² By the return of the subpoena is meant that the marshal indorses thereon in writing a statement of the manner in which he has executed it, and signs the statement officially, and files it in the clerk's office, and the return does not become matter of record until it is so filed.³ Except in ancillary suits and suits *in rem*, the return of the marshal should show affirmatively that the subpoena was executed in the district where the suit is instituted and pending.⁴ In the exercise of a sound discretion the court may allow the marshal to amend his return so as to make it conform to the real facts.⁵ When the subpoena is returned into the clerk's office, the clerk should mark it filed, date and sign the filing, and make an entry thereof on the order book;⁶ and if the return of the subpoena shows that it has been served and executed upon any defendant, the clerk should enter the suit upon his docket as pending in the court and state the time of the entry.⁷

§ 161. When defendant must enter his appearance.—An equity rule provides that: "The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable. The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk."⁸ Appearance is defined to be the process by which a person against whom a bill has been filed submits himself to the jurisdiction of the court; and in the

¹ Equity Rule 12.

² Equity Rule 17.

³ *Dickson v. Peppers*, 7 Ired. 429; *State v. Melton*, 8 Mo. 417; *Nelson v. Cook*, 19 Ill. 440; *Welsh v. Joy*, 13 Pick. 482.

⁴ *Allen v. Blount*, 1 Blatchf. 480, 487, Fed. Cas. No. 215; *Thayer v.*

Wales, 5 Fish. Pat. Cas. 448, Fed. Cas. No. 18,872.

⁵ *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775, 779; *Adams v. Robinson*, 1 Pick. 461; *Johnson v. Day*, 17 Pick. 106.

⁶ Equity Rule 4.

⁷ Equity Rule 16.

⁸ Equity Rule 17.

High Court of Chancery of England the appearance of the defendant was necessary in all cases, in order to give the court cognizance of the matter in dispute, and the rule was so strictly adhered to that no decree *pro confesso* could be made against a defendant for whom no appearance had been entered. This rule was, however, abolished by a statute passed during the fifth year of the reign of George II.¹ But this rule does not obtain in the courts of the United States, and in suits in equity in those courts a decree *pro confesso* may be entered against a defendant who has been legally served with process, whether he enters his appearance or not.² If a defendant has been informed that a bill has been filed against him, he may cause an appearance to be entered for him without waiting to be served with a subpoena, and such proceeding is called appearing *gratis*;³ and in the circuit courts of the United States a waiver of process and an authorized appearance in a suit in equity is as effectual to give the court jurisdiction as an actual service of the subpoena.⁴

§ 162. General and special appearances.—Jurisdiction of the person of the defendant is obtained by the service of process upon him, or by his voluntary appearance;⁵ and a general appearance in person or by an authorized attorney waives all defects in the process and its service, and all special privileges of the defendant in respect to the particular court in which the action is brought, and all objections to the jurisdiction founded on the non-residence of the defendant in the district where he is sued;⁶ and the general appearance of the defend-

¹ 2 Daniell, 4.

² Equity Rule 18; Thomson v. Wooster, 114 U. S. 104, 112.

³ 2 Daniell, 16.

⁴ Knox v. Summers, 3 Cranch, 496; Pollard v. Dwight, 4 Cranch, 421; Farrar v. United States, 3 Pet. 459; Gracie v. Palmer, 8 Wheat. 699; Rhode Island v. Massachusetts, 12 Pet. 657; Walker v. Robbins, 14 How. 584; Washington, A. & G. R. Co. v. Brown, 17 Wall. 445; Creighton v. Kerr, 20 Wall. 8; Maxwell v. Stewart, 21 Wall. 70; Hill v. Mendenhall, 21 Wall. 453; Edwards v. United

States, 103 U. S. 471; Johnson v. Waters, 111 U. S. 640.

⁵ Cooper v. Reynolds, 10 Wall. 308.

⁶ St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127; Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 98; Habich v. Folger, 20 Wall. 1; Creighton v. Kerr, 20 Wall. 8; Knox v. Summers, 3 Cranch, 496; Farrar v. United States, 3 Pet. 495; Johnson v. Waters, 111 U. S. 640; Taylor v. Longworth, 14 Pet. 172; Toland v. Sprague, 12 Pet. 300; Pollard v. Dwight, 4 Cranch, 421; Shields v. Barrow, 18 How. 253; Jones v. Andrews, 10 Wall. 327; Gra-

ant in a suit which is a proceeding *in rem* gives the court jurisdiction over the person of the defendant, and authorizes a personal judgment against him.¹ The right of defendant to insist upon suit against him being brought only in the district whereof he is an inhabitant is a personal privilege which he may waive; and where the suit is one of which the court can take jurisdiction, and the defendant in the first instance files a demurrer to the bill on the ground of the want of jurisdiction, or the want of equity in the bill, or that the bill does not state a cause of action, or otherwise pleads to the merits, he thereby enters a general appearance to the merits and waives all defects in the service and all special privileges in respect to the particular court in which the action is brought, and cannot thereafter challenge the jurisdiction of the court upon the ground that the suit was brought in the wrong district, nor upon the ground of the illegality of the process and service.² If the defendant desires to urge his objections to any defects in the process and service, or to insist upon his privilege of being sued in a district whereof he is an inhabitant, without submitting himself to the jurisdiction of the court, he should enter a special appearance for the special and single purpose of objecting to the jurisdiction of the court over him; and if his objections are overruled he may except to the ruling of the court, and then plead to the merits of the cause, and neither the special appearance nor his subsequent defense to the merits will be a waiver of the objection to the jurisdiction;³ and a state statute, the provisions of which give to a special appearance, made by the defendant for the purpose of objecting to the jurisdiction of the court, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the federal courts

cie v. Palmer, 8 Wheat. 699; *Walker v. Robbins*, 14 How. 584; *Hill v. Mendenhall*, 21 Wall. 453; *Atkins v. Fiber, etc. Co.*, 18 Wall. 272; *New England Ins. Co. v. Detroit & C. Steam Nav. Co.*, 18 Wall. 307; *Interior Const. & Imp. Co. v. Gibney*, 160 U. S. 217, 220.

¹ *Creighton v. Kerr*, 20 Wall. 8; *Maxwell v. Stewart*, 21 Wall. 71.

² *St. Louis & S. F. R. Co. v. Mc-*

Bride, 141 U. S. 127; *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98; *Toland v. Sprague*, 12 Pet. 300; *Jones v. Andrews*, 10 Wall. 327.

³ *Southern Pacific Co. v. Denton*, 146 U. S. 202; *Harkness v. Hyde*, 98 U. S. 476, 479; *Atchison v. Morris*, 11 Fed. R. 582.

sitting in that state.¹ Where a defendant is sued in a state court, his right to object to the insufficiency of the service of process is not waived by filing a petition for removal, and by obtaining a removal to the circuit court of the United States, where the defendant appeared for the sole purpose of presenting the petition for removal.² The filing of a petition by a defendant in a state court for the removal of a cause to a circuit court of the United States, without specifying or restricting the purpose of the defendant's appearance in the state court, is not a general appearance, but a special appearance only, and is not a waiver of any objection to the jurisdiction of the court over the person of the defendant, or to the insufficiency of the service of the process.³ When a defendant has filed a plea to the merits, and afterwards by leave of the court withdraws the plea, that does not withdraw his appearance, and he is still in court so as to be bound personally by a judgment or decree rendered against him in the suit.⁴ Where, in a proceeding *in rem*, non-resident defendants who have been served by publication voluntarily appear and file answers to the merits, and subsequently, by leave of the court, and against the objection of the plaintiffs, withdraw their answers without prejudice to the plaintiffs, such action is not a withdrawal of the appearance of such defendants, and does not deprive the plaintiff of his right to a personal decree against them.⁵ A general appearance, after being entered, can in no case be withdrawn or altered, so as to make it a special appearance, without proper notice, and leave of the court first obtained.⁶ Neither can an attorney withdraw his appearance without leave of the court.⁷ In the case cited Chief Justice Taney said: "No attorney or solicitor can withdraw his name after he has once entered it on the record, without the leave of the court; and while his name continues there

¹ Mexican C. R. Co. v. Pinkney, 149 U. S. 194; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496; Southern Pacific Co. v. Denton, 146 U. S. 202.

² Goldey v. Morning News, 156 U. S. 518.

³ Wabash W. R. Co. v. Brow, 164 U. S. 271; National Acc. Soc. v. Spiro, 164 U. S. 281.

⁴ Eldred v. Michigan Ins. Bank, 17 Wall. 545.

⁵ White v. Ewing, 69 Fed. R. 451, 454; Creighton v. Kerr, 20 Wall. 8.

⁶ United States v. Armejo, 70 U. S. (Book 18, Lawy. ed.) 247.

⁷ United States v. Curry, 6 How.

106.

the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court will permit an attorney who had appeared at the trial with the sanction of the party, expressed or implied, to withdraw his name after the case was finally decided; for if that could be done, it would be impossible to serve the citation where the party resided in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after final trial and decree, we think the court should regard any attempt to do so as open to just rebuke."

CHAPTER VIII.

TAKING THE BILL PRO CONFESSO.

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| <p>§ 163. Definition of decree <i>pro confesso</i>.</p> <p>164. Origin and history of the proceeding.</p> <p>165. The present practice of taking the bill <i>pro confesso</i>.</p> <p>166. The effect of taking the bill <i>pro confesso</i>.</p> <p>167. When a final decree <i>pro confesso</i> may be entered.</p> | <p>§ 168. Same—Striking out answer for contempt of jurisdictional orders.</p> <p>169. Against whom the bill may be taken as confessed.</p> <p>170. Opening orders and decrees <i>pro confesso</i>.</p> <p>171. Rights of defendant after decree <i>pro confesso</i> against him.</p> |
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§ 163. **Definition of decree *pro confesso*.**—In cases where the defendant fails to obey the writ of subpoena issued against and served upon him, requiring him to appear and answer the bill, courts of equity have adopted a method of rendering their process effective, by treating the defendant's contumacy as an admission of the plaintiff's case; and such courts will, and do, in cases of a disobedience of the subpoena by the defendant, make an order that the facts stated in the bill shall be considered as true, and decree against the defendant according to the equity arising upon the case stated by the plaintiff. This proceeding is termed taking a bill *pro confesso*.¹ To take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and a decree *pro confesso* is a decree based on the statements of the bill assumed to be true.²

§ 164. **Origin and history of the proceeding.**—"By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action; but in later times this rule was changed so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. The original practice of the English court of chancery was in accordance

¹ 1 Daniell, 679.

² Thomson v. Wooster, 114 U. S. 104-120.

with the later Roman law. But for at least two centuries past bills have been taken *pro confesso* for contumacy. 'Where a man appears by his clerk in court, and after lies in prison, and is brought three times by *habeas corpus* and has his bill read to him, and refuses to answer, such public refusal in court does amount to the confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure to the sequestration, there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court and withstands all its process without answering.'"¹ It was a maxim of the civil law, adopted by the English court of chancery, that the appearance of the defendant was necessary to give the court jurisdiction; and, therefore, no decree *pro confesso* could be made against a defendant for whom no appearance had been entered; and this continued to be the rule in all cases till the statute of 5 Geo. 2, ch. 25, which empowered the court to order the bill to be taken *pro confesso* against persons who absconded or went out of the realm to avoid being served with the process of the court, although no appearance had been entered for them. That act required that an order should be made by the court requiring the defendant to appear at a certain day named therein, and made provision for service of the order by publication; and authorized the court, upon failure of the defendant to appear within the time limited by the order, or within such further time as the court should appoint, and proof made of the publication of the order, to order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as should be thought just; and thereupon to issue process to compel the performance of such decree, either by an immediate sequestration of the real and personal effects of the party so absconding, or such part thereof as should be sufficient to satisfy the demands of the plaintiff in the suit, or by causing the possession of the estate or effects demanded by the bill to be delivered to the plaintiff. The act was revised and continued in force by subsequent legislation.²

¹Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104-120.

²1 Daniell, 270-277, 680, 681; 2 Daniell, 4; 1 Smith's Ch. Pr. 152-157.

The second, sixth, tenth and seventeenth of the old United States equity rules, adopted in 1822, are as follows:

“Rule II. All process shall be made returnable to the next succeeding term or to any intermediate rule-day, at the election of the party praying the same, and the return of the said process ‘executed’ shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned; and where such process shall not be executed, the clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out; and if upon such second process the party be not found, a copy shall again be left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.”

“Rule VI. The day of appearance shall be the rule-day after the process is returned executed, or after the second return of a copy left if the process shall not be executed, when the process is returnable to the rules, or the rule-day next succeeding the term, where the process shall be returnable to a term of the court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute unless cause be shown at the term next succeeding that to which the process shall be returned executed.”

“Rule X. If the defendant does not file his answer within three months after the subpoena returned executed, or after a second return of a copy left having been made at least three months, the plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases as if the answer had been filed and the cause was at issue. Provided that the court

may, on cause shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the court or one of the judges thereof."

"Rule XVII. Rules to plead, answer, reply, rejoin or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule-book for the information of all parties, attorneys or solicitors concerned therein, and shall be considered as sufficient notice thereof."¹

Justice Washington at the circuit in 1823 made two rulings, based upon the peculiar provisions of the equity rules of 1822, above quoted. In the first case he held that, under the above rules, to entitle the plaintiff to take the bill *pro confesso* on account of an answer not being filed within the three months after the day of appearance and bill filed, the defendant should have been ruled to answer, and the cause should be set down. The decree in this case is merely *nisi*, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause is shown to the contrary.² In the second case he held that, under the above rules, if the bill be taken *pro confesso* at one term of the court, and service of the decree be made and returned at the same term, it may be made absolute at the following term; otherwise it cannot be made absolute until the third term of the court.³ These decisions of Justice Washington, though a correct construction and exposition of the equity rules of 1822, then in force, are not now the law, the practice stated by him having been abrogated by the equity rules of 1842.⁴

§ 165. The present practice of taking bills *pro confesso* — When the order may be taken.—The practice and proceedings in taking bills *pro confesso* are almost wholly governed by the United States equity rules; but the effect and meaning of the terms employed in those rules must be sought in the En-

¹ 7 Wheat., vii.

² Pendleton v. Evans, 4 Wash. 336, Fed. Cas. No. 10,920.

³ Pendleton v. Evans, 4 Wash. 391,

Fed. Cas. No. 10,921.

⁴ Equity Rules 18, 19; O'Hara v. McConnell, 93 U. S. 150-155.

glish equity practice as it existed at the time those rules were adopted in 1842.¹ These equity rules state specifically the circumstances under which the bills may be taken *pro confesso*, and nothing can be a better guide to the practitioner than the quotation of the rules. Under these rules the bill may be taken *pro confesso* under the following circumstances:

(1) "At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*."² Under this rule, if the defendant fails to enter his appearance on or before the return day of the writ, the bill may be taken *pro confesso*.³

(2) "It shall be the duty of the defendant, unless the time shall otherwise be enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order as of course in the order book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."⁴

(3) "And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with

¹Thomson v. Wooster, 114 U. S. 104-120.

²Equity Rule 12.

³Thomson v. Wooster, 114 U. S. 104-120.

⁴Equity Rule 18.

justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.”¹

(4) “In every case where an amendment” (to the bill) “shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment to the bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an admission to put in an answer.”²

(5) “If, at the hearing, the exceptions” (for insufficiency to the answer) “be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.”³

(6) Where a bill is filed under the eighth section of the act of March 3, 1875, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district where the suit is filed, and any absent defendant shall not appear, plead, answer or demur within the time limited by the order of the court, then upon proof of the service or publication of the order of the court requiring such defendant to appear, plead, answer or demur, and the performance of the directions contained in the order, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process in the district. In such case the bill may be taken *pro confesso* for want of an appear-

¹ Equity Rule 34; *Suydam v. Beals*,
4 McLean, 12, Fed. Cas. No. 13,653.

² Equity Rule 46.

³ Equity Rule 64; *Hale v. Continental Life Ins. Co.*, 20 Fed. R. 344.

ance or answer, just as if the defendant had been served within the district.¹

The order taking a bill *pro confesso* is an order of course, not requiring the allowance of any judge, and may be taken on any rule-day, and should be entered on the order book.²

§ 166. The effect of taking the bill *pro confesso*.— When the allegations of the bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs, and a decree will be made accordingly; but where the allegations of a bill are indefinite, or the demand of the plaintiff is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the plaintiffs.³ The doctrine is well settled that when the allegations of a bill are distinct and positive, and the bill is taken for confessed, such allegations are taken as true without proof. The authorities clearly establish the principle that if the allegations are of a nature so distinct and positive, that, taking them to be true, the court can make a decree upon them, it will, upon the order *pro confesso*, decree without proof. Where they are in their nature so defective or vague that a precise decree cannot be made upon them, proof must be adduced from the necessity of the case. No rule could be better founded in reason and propriety.⁴ If one of several defendants to a bill making a joint charge of conspiracy and fraud make default, his default and a formal decree *pro confesso* may be entered against him; but no final decree on the merits can be made until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court, and can take no further part in the case. If the bill in such case be dismissed on the merits,

¹ 18 U. S. Stat. at L. ch. 137, sec. 8; Williams v. Corwin, Hopk. Ch. 471–Equity Rules 12, 18. 477; Spears v. Cheatam, 44 Miss. 64;

² Equity Rules 2, 4, 5, 18.

Ohio Cent. R. Co. v. Cent. Trust Co.,

³ Thomson v. Wooster, 114 U. S. 133 U. S. 83–92.
104–120; United States v. Samperyac, ⁴United States v. Samperyac,
Hempst. 118, Fed. Cas. No. 16,216a; *supra*.

it will be dismissed as to the defendants in default as well as to those who have answered.¹

§ 167. When a final decree *pro confesso* may be entered.—

There is a very material distinction between an order entered as of course on the order book, taking the bill as confessed, and a final decree upon the merits entered by the court upon the allegations of the bill as confessed and assumed to be true. The only effect of the order of course taking the bill as confessed is to obviate the necessity of proof of the allegations of the bill which are distinct and positive,² and to enable the plaintiff to proceed with the cause *ex parte*, and such order settles no rights unless followed by a final decree on the merits.³

The time when a final decree *pro confesso* may be entered and the absolute character of such decree are prescribed and fixed by the equity rules. One rule provides that after the order *pro confesso* has been entered upon the order book: "Thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed."⁴ And another rule provides: "When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute unless the court shall, at the same term, set aside the same or enlarge the time for filing an answer, upon cause shown, upon motion and affidavit of defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct and submit to such other terms as the court shall direct, for the purpose of

¹ Frow v. De La Vega, 15 Wall. 552, 554.

² Thomson v. Wooster, 114 U. S. 104-120; United States v. Sampereyac, Hempst. 118, Fed. Cas. No. 16,216a; Williams v. Corwin, Hopk. Ch. 471-477; Spears v. Cheatam, 44 Miss. 64;

Ohio Cent. R. Co. v. Cent. Trust Co., 133 U. S. 83-92.

³ Equity Rule 18; Lockhart v. Horne, 3 Woods, 542, Fed. Cas. No. 8,446.

⁴ Equity Rule 18.

speeding the cause.”¹ The final decree must be rendered during a term of the court; this is evident from the language of the rule to the effect that “such decree shall be deemed absolute unless the court shall, at the same term, set aside the same.”² It is error to render a final decree for want of appearance at the first term after service of the subpoena unless another rule-day has intervened.³ Such final decree, when made in accordance with the equity rules, is as binding and conclusive as any decree made in the most solemn manner; and it cannot be impeached collaterally, but only upon a bill of review or upon a bill to set it aside for fraud.⁴ A final decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such a decree as the plaintiff chooses to make; but it should be made by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true.⁵ A defendant against whom an order has been entered taking the bill as confessed is not entitled to notice of an application for a final decree. Equity rule 18 declares that when the bill has been taken as confessed for the failure to file an answer, even where the defendant has entered his appearance, “the cause shall be proceeded in *ex parte*.” And the United States supreme court has expressly held that where the bill has been taken as confessed, “the defaulting defendant has merely lost his standing in court. He will not be entitled to service of notice in the cause nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing.”⁶ And Chancellor Kent held that when the bill has been taken *pro confesso* no notice of the final hearing need be given to the defendant. “The defendant who suffers the bill to be taken *pro confesso* has nothing to say, and requires no such notice.”⁷ In applying for a final decree the proper practice is to enter an order on the order book, setting the cause down for final hearing before the court in term time, on bill,

¹ Equity Rule 19.

² Equity Rule 19; *O'Hara v. McConnell*, 93 U. S. 150-155.

³ *O'Hara v. McConnell*, 93 U. S. 150-155.

⁴ *Thomson v. Wooster*, 114 U. S. 104-120; 1 *Daniell*, 696.

⁵ Equity Rules 18, 19; *Thompson v.*

Wooster, 114 U. S. 104-120; *Ohio Cent. R. Co. v. Cent. Trust Co.*, 133 U. S. 83-92.

⁶ *Frow v. De La Vega*, 15 Wall. 552-554; *Austin v. Riley*, 55 Fed. R. 833.

⁷ *Rose v. Woodruff*, 4 Johns. Ch. 547.

process, service (or publication and proof thereof, as the case may be), and the order *pro confesso*; and upon the hearing the entire record in the cause should be exhibited to the court so that it may see from an inspection thereof that the proceedings are regular; and the bill should be opened, and its averments read or stated to the court, so that it may determine whether there is cause, upon the allegations of the bill assumed to be true, to decree for the plaintiff.¹ It is stated in some of the text-books² that if a defendant has appeared, and the bill be taken as confessed against him, he is entitled to notice and to be heard on the final decree; but we have found but two cases,³ in federal courts, under the present equity rules, supporting this contention, and in both cases the opinion was delivered in the circuit court by district judges, and in neither case is any authority directly in point cited, except in the latter of the two cases the opinion in the former is cited. Justice Bradley calls attention to the fact that the provision in the present equity rule 18, that after the bill has been taken as confessed "the cause shall be proceeded in *ex parte*," was not contained in any of the equity rules in force prior to 1842;⁴ and District Judge Woolson, referring to this provision of the rule, said: "If the phraseology of the present rule is to govern, the complainant in the *ex parte* proceeding would not be required, however much it might be thought the more desirable plan, to give notice to the defaulting party of the application for final decree."⁵

Some confusion and misapprehension have arisen upon the subject as to whether notice of the application for final decree is required, growing out of the fact that the equity rules of 1822⁶ expressly required that notice should be given in such cases; and this confusion and misapprehension have been increased by the further fact that the decisions of the courts under the rules of 1822 have sometimes been inadvertently, and without discrimination, cited and applied in the practice under the present rules adopted in 1842. The entire scheme and system of practice in obtaining decrees *pro confesso*, as

¹ *Rose v. Woodruff*, 4 Johns. Ch. Fed. Cas. No. 1,320; *Southern Pac. R. 547*; *O'Hara v. McConnell*, 93 U. S. Co. v. Temple, 59 Fed. R. 17. 150-155; *Equity Rules* 18, 19.

² *Beach, Equity Prac.*, sec. 199.

⁴ *Thomson v. Wooster*, 114 U. S. 104-120.

³ *Bennett v. Hoefner*, 17 Black, 341,

⁵ *Austin v. Riley*, 55 Fed. R. 833.

⁶ *Wheat.*, vii.

provided for in the rules of 1822, were abrogated and abolished by the rules of 1842;¹ and the decisions (which are cited below²) made upon the subject of notice, under the rules of 1822, are wholly inapplicable to the practice under the rules now in force, the supreme court of the United States having held, in an opinion delivered by Justice Story, that a defaulting defendant is not entitled to notice of the application for a final decree *pro confesso* unless such notice is required by a rule of the court.³

§ 168. Same — Striking out answer for contempt of judicial orders.— A decree *pro confesso* entered after striking defendant's answer from the files as a punishment for his contempt in refusing to obey an order of the court is void for want of due process of law.⁴

In the course of the opinion in the case last cited, the United States supreme court, speaking by White, J., said:

"The facts out of which this controversy grows are fully stated in *Hovey v. McDonald*, 109 U. S. 150, but we briefly reiterate those which are material to an understanding of the issues now presented. A. R. McDonald, a British subject, obtained an award from the mixed commission appointed under the treaty of 1871 for the settlement of the 'Alabama claims.' 17 Stat. at L. 863. Before the payment of the award two suits in equity were commenced in the supreme court of the District of Columbia against McDonald and one William White, to whom it was asserted McDonald had made a fraudulent assignment of his claim. One of these suits was by Thomas R. Phelps, who alleged that he was the owner of the claim as the assignor in bankruptcy of McDonald; the other was brought by Hovey and Dale, who claimed to be entitled to a one-fourth interest in the award in consequence of an alleged contract which they asserted they had made with McDonald entitling them to an interest to that extent for professional services rendered in the prosecution of the claim. Injunctions were issued

¹ Equity Rules 12, 18, 19, 34, 46, 67. *derman v. Halderman*, Hempst. 407,

² *Pendleton v. Evans*, 4 Wash. 336, Fed. Cas. No. 5,908.

Fed. Cas. No. 10,920; *Pendleton v. Evans*, 4 Wash. 391, Fed. Cas. No. 10,921; *Stewart v. Smith*, 2 Cranch

³ *United States Bank v. White*, 8 Pet. 262.

⁴ *Hovey v. Elliott*, 167 U. S. 409-447.

against the collection by McDonald and White of the fund. In the Phelps suit a consent decree was entered, which was also assented to by the parties in the Hovey and Dale claim, releasing one-half of the award, and authorizing G. W. Riggs, who was appointed receiver, to collect the other half and retain it to abide the result of both suits. The receiver, moreover, was directed to invest the money by him collected in registered bonds of the United States or of the District of Columbia, guarantied by the United States.

"The bills and amended bills were demurred to in each suit, and, the demurrer in both cases being sustained, the bills were dismissed. The decree of dismissal in the Hovey and Dale case, entered on June 24, 1875, simply stated that the demurrer was sustained and the bill dismissed with costs. On the same day an appeal, without *supersedeas*, to the general term, was noted on the minutes of the court. This decree was a few days afterwards, on 28th day of June, amended by ordering the receiver to pay over the funds in his hands and providing for his discharge. This decree was presented to the receiver, and, in accordance with the personal and verbal instructions given him by a judge of the court by which the decree of dismissal was rendered, the receiver delivered the bonds in his custody to McDonald. On the same day the firm of Riggs & Company, supposing that they had a perfect right so to do, purchased the bonds from McDonald at their full market value, and caused them to be transferred into their name. The decree of dismissal in the Phelps case, which was also appealed from, was affirmed by the general term of the supreme court of the District, but that in the case of Hovey and Dale was reversed. The latter case was put at issue by filing an answer, averring fraud and wrongdoing on the part of Hovey and Dale, the answer alleging facts which, if found to be true, would have defeated a recovery by complainants. After replication, testimony was taken at various times during the years 1875 and 1876.

"In June, 1877, the complainants obtained an order from the supreme court of the District of Columbia at general term, requiring the defendants McDonald and White to pay over to the registry of the court the sum of \$49,297.50, which had been paid them by the receiver. The order was disobeyed, and

thereupon the complainants, in September, 1877, moved the defendants McDonald and White to show cause why they and each of them should not be punished for disobedience of the order as for a contempt. On December 8, 1877, the supreme court of the District of Columbia made a decree at general term that the rule upon the defendants to show cause why they should not be decreed to be in, and punished as for, contempt, be made absolute, and that the said McDonald and White be taken and deemed to be in contempt of the aforesaid order. Such decree further provided that unless McDonald and White, within six days from the entry of this order, and a service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay unto the said registry of this court the sum of \$49,297.50, the answers filed by them in the cause be stricken out, and that this cause proceed as if no answer therein had been interposed; and that, until the said defendants shall comply with the said order of June 19, 1877, all proceedings on the part of said defendants in the cause be and the same are hereby perpetually stayed. On December 29, 1877, the supreme court of the District of Columbia at general term, on motion of the complainants, and proof of non-compliance on the part of defendants McDonald and White with the requirements of the decree of December 8, 1877, ordered, adjudged and decreed that the answer filed by the defendants McDonald and White be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed. On February 12, 1878, the supreme court of the District of Columbia, at general term, made decree as follows: The answer of defendants having been removed from the files for their contempt in refusing to obey the order of the court and deposit in the registry the sum of \$49,297.50, it is now ordered, adjudged and decreed that the bill be taken *pro confesso* against them. On April 17, 1878, that order was made absolute by another order or decree, which, after reciting material allegations in the complainants' bill as standing without denial on the part of defendants, ordered and adjudged that the complainants have a lien upon the claim of Augustine R. McDonald against the United States of \$197,190, and upon any draft, money, evidence of indebtedness or proceeds thereof. Thereafter proceedings were taken

in the court by which the judgment had been awarded, to compel Riggs as receiver to account for the money which had come to his hands and which he had paid over to McDonald under the circumstances already stated. This suit culminated in a judgment in favor of Riggs, affirmed by this court in *Hovey v. McDonald*, 109 U. S. 150.

“The suit now before the court was subsequently commenced in the state of New York against the surviving partners of Riggs & Company, but service was had on only one of the partners, John Elliott, and, he having died, his executors were substituted as parties defendant. The object of the suit was to compel the defendants to account for the bonds or their value, upon the theory that Riggs & Company had acquired them with actual notice of the pending litigation concerning the bonds, and were bound by the results of the judgment rendered as above stated in the suit of *Hovey v. McDonald*. The court of appeals of New York held that the judgment was not binding upon Riggs & Company, or the surviving members thereof, because it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause; the judgment was beyond the jurisdiction of the court, as the power of the courts of the District of Columbia to punish for contempt was restricted by the provisions of the United States Revised Statutes, section 725. 145 N. Y. 126. The New York court, moreover, held that, even assuming that the supreme court of the District had jurisdiction, and that the doctrine of the liability of purchasers *pendente lite* applied to a purchase made under the circumstances shown, the firm of Riggs & Company were not such purchasers with reference to the judgment in question, as the *lis* in which the judgment was rendered was not the one pending at the time of the sale to the firm. From this judgment error was prosecuted to this court upon the theory that the decision of the court of appeals of the state of New York denied proper faith and credit to the judgment rendered by the supreme court of the District of Columbia.

“Whether, as held by the court below, the courts of the District of Columbia are confined, in all characters of contempt, only to an infliction of the penalties authorized in the United States Revised Statutes, section 725, and therefore have no

power in any other form or manner to punish for a contempt, is a question which we do not deem it necessary to decide, and as to which, therefore, we express no opinion whatever. In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined; that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

“In *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, the court through Mr. Justice Swayne said: ‘In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. . . . The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.’ And quoting with approval this language in *Windsor v. McVeigh*, 93 U. S. 227, the court

speaking through Mr. Justice Field again said: 'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized and you shall not be heard. In the present case the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence.' This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded an opportunity to be heard. . . . The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words his property, belonged to the complainants in the cause. The decree, therefore, awarded the property of the defendants to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this by

denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law? If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

“But the argument is that however plain may be the want of power in all other branches of the government to condemn a citizen without a hearing, both upon the elementary principles of justice and under the express language of the constitution, these principles do not limit the power of the courts to punish for contempt or as for contempt, because it is asserted that from the earliest times the chancery court in England has possessed and exercised the power to refuse the right to be heard to one in contempt, and that a power so well established in England before the adoption of the constitution, and which has been so often exercised since, is not controlled by the principles of reason and justice just stated. But this contention is without solid foundation to rest upon, and is based upon a too strict and literal rendering of general language to be found in isolated passages contained in the works of writers on ancient law and practice, and on loose statements as to the practice of the courts of chancery to be found in a few decisions of English courts. Certain it is that in all the reported decisions of the chancery courts in England no single case can be found where a court of chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And in the American adjudications, while there are two cases, one in New York and the other in Arkansas, asserting the existence

of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous character of the conclusions reached.

“The foundation of the assertion that the power existed in and was exercised by the English court of chancery to strike from the files an answer of a defendant in contempt for disobedience to an order made in the cause, and to decree *pro confesso* against him, primarily rests upon what is supposed to be the true construction of one of the ordinances of Lord Bacon (promulgated in 1618), which reads as follows: ‘78. They that are in rebellion, especially as far as proclamation of rebellion, are not to be here (heard?), neither in that suit, nor any other, except the court of special grace suspend the contempt.’

“What construction was given to this ordinance or the extent to which it was enforced by the court of chancery in the years immediately succeeding its adoption cannot be positively affirmed, as we have not found nor have we been referred to any decisions made in the seventeenth or eighteenth centuries purporting to be based upon that ordinance.

“On the mere text of the ordinance, it is manifest that it does not necessarily embrace the power to enter a decree *pro confesso*, after answer filed, upon the theory that defendant was guilty of a contempt. On the contrary, the proclamation of rebellion, referred to in the ordinance, was one of the then recognized processes for the purpose of compelling an answer in the suit. Indeed, the powers of the chancery courts to punish for contempt were normally brought into play, beginning with an attachment of the person and culminating in the sequestration of the property of the one in contempt, in order to compel an appearance and answer. Gilbert, *Forum Romanum*, p. 33; *Bl. Com.*, bk. 3, p. 443. Nowhere in these works is there an intimation that, as a penalty for contempt, a refractory defendant, not in default for answer, might be punished by being disallowed the right to defend against the bill filed in the cause. So far from such being the case, as already stated, a party who failed to appear or answer was treated as in contempt, and the various processes for contempt were resorted to in order to compel his appearance and answer; this being done in order that the conscience of the court might be satisfied when it entered a decree in the cause. . . . The re-

view and analysis of the English cases which we now propose to make will demonstrate that the passages to which we have just referred could not have imported the power of a court to strike an answer from the files and take a bill for confessed because of a contempt, since that analysis will conclusively establish that there is no basis for the assertion that the courts of chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the chancery courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between a want of power, on the one hand, to refuse to one defendant in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases."

After a review and analysis of the English and American cases, from the case of *Phillips v. Buck*, 1 Vern. 228, decided in 1683, the opinion of the court proceeds: "The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us. The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso*, which results from the foregoing review of the authorities, is strengthened by the reflection that, if such power obtained, then the ancient common-law doctrine of 'outlawry,' and that of the continental system as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

"It being therefore clear that the supreme court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot

be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey v. McDonald*, 109 U. S. 150, upon which the rights of the plaintiff in error depend, it is plain that the judgment was one substantially without a hearing; for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defense? As said by this court in *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 689: 'The substance, and not the shadow, determines the validity of the exercise of the powers.'"¹

§ 169. Against whom the bill may be taken as confessed.

A decree cannot be obtained against an infant upon the mere fact of taking the bill *pro confesso*, nor upon an answer in form by the guardian *ad litem*. The answer in such case generally is that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them, as he shall be advised, and throws himself upon the protection of the court. A decree upon such an answer would not bind the infant, and he could open it or set it aside. A decree cannot be rendered against a minor unless it be on proof of the allegations of the bill; it cannot be taken as confessed, nor can the guardian admit the bill so as to bind minor defendants. It is the duty of the court to protect the interests of minors, and refuse to render a decree depriving them of their rights, except on the same proof that would be required if every material allegation of the bill had been denied by an answer; and it is error to render a decree on any less proof. Neither a default nor a decree *pro confesso* can be taken against an infant. There must be a guardian *ad litem* appointed for him, and the guardian must file an answer; and the plaintiff must then make full proof of his right to the relief claimed. Even where the answer of the guardian admits the bill to be

¹ *Hovey v. Elliott*, *supra*.

true, the plaintiff must prove the truth of his allegations with the same strictness as if the answer had interposed a direct and positive denial. A court of chancery will not decree against infants without full proof, though their guardian *ad litem* confess the ground of action. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court. They defend by guardian to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the matter in question. It is a well settled principle that before a decree can pass against an infant defendant in chancery, full proof must be made against him, and that proof preserved in the record or decree. No presumption can be indulged that proof was made against the infant defendant unless it is shown by the record. The answer of a guardian *ad litem* admitting the truth of the averments in the bill cannot affect the infant's right, but with respect to him all the allegations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth.¹ It follows as a logical necessity from the practice in the English court of chancery in regard to defendants who were idiots, lunatics, or persons of unsound mind, that the bill could not be taken as confessed against such defendants.² Under the practice of the English High Court of Chancery, if an appearance be entered for a defendant who is a married woman, process for contempt may run against her to compel an answer;³ and it would therefore seem that a decree *pro confesso* could be taken against a married woman under such circumstances. A decree *pro confesso* may be taken against a corporation.⁴ It is a general rule that a bill may be taken *pro confesso* against any defendant who is not under any disability.⁵

¹ Mills v. Dennis, 3 Johns. Ch. 367-370; Walton v. Coulson, 1 McLean, 120, Fed. Cas. No. 17,132; U. S. Bank v. Ritchie, 8 Pet. 128; O'Hara v. McConnell, 93 U. S. 151; Enos v. Capps, 12 Ill. 256, 258; Chaffin v. Kimball, 23 Ill. 36, 38; Quigley v. Roberts, 44 Ill. 503-506; Wright v. Miller, 1

Sandf. Ch. 109; White v. Miller, 158 U. S. 128, 150; Story's Eq. Pl., sec. 871.

² 1 Smith's Chan. Prac. 146, 259, 260, 261.

³ 1 Daniell, 205-219.

⁴ 1 Daniell, 190-193.

⁵ Equity Rule 18.

§ 170. **Opening orders and decree pro confesso.**— When a final decree *pro confesso* has been entered in accordance with the rules, “such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.”¹ Under the rule quoted, the requirements of an application to set aside a decree *pro confesso* are as follows: (1) The application must be made at the same term of the court during which the decree is entered; (2) the application should be made upon motion of the defendant; (3) the application must be supported by the affidavit of the defendant; (4) the application will not be granted unless upon payment of the costs of plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable; (5) the application will not be granted unless the defendant shall undertake to file his answer within such time as the court shall direct; and (6) unless the defendant shall submit to such other terms as the court shall direct for the purpose of speeding the cause; (7) the decree can be set aside only “upon cause shown.” The application and supporting affidavit should show a meritorious defense; and the rule in equity that, where a defendant sets up by his answer under oath two inconsistent defenses, the result will be to deprive him of the benefit of either, applies to an answer under oath read as an affidavit of merits, on a motion to set aside a decree *pro confesso*, and the decree will not be set aside where the affidavit sets up two flatly inconsistent defenses.² The defendant should state the substance of his defenses in the affidavit upon which the application is founded, so that the court may see what the alleged defense is, and be able to form an opinion as to whether the

¹Equity Rule 19; *French v. Stewart*, 22 Wall. 238-250; *Allen v. Wilson*, 21 Fed. R. 881.

²*Ozark Land Co. v. Leonard*, 24 Fed. R. 660.

defendant has a meritorious defense, or only a mere technical defense, or whether he has any defense whatever.¹ A copy of the application and affidavit should be served on the plaintiff.² The order entered of course upon the rule book, taking the bill as confessed, will be more readily set aside than will a final decree *pro confesso*; the former will, when the default is satisfactorily explained, be set aside almost as a matter of course.³

§ 171. Rights of defendant after decree pro confesso against him.—Under the English practice as it existed at the time of the adoption of our present equity rule (in 1842), the defendant, after a decree *pro confesso* and reference for an account, was entitled to appear before the master, to have notice of and take part in the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms;⁴ but it was only a defendant who had entered his appearance and against whom the bill had been taken as confessed for want of an answer who was so entitled to attend before the master.⁵ But the allegations of the bill cannot be questioned before the master.⁶ The defendant has the right to take and prosecute an appeal from a final decree *pro confesso*.⁷ On the appeal the defendant will not be allowed to question the allegations of the bill nor the want of evidence, but he may on such appeal contest the sufficiency of the bill and insist that the averments contained in it do not justify the decree, and anything in the allegations themselves tending to show that the decree is erroneous is assignable for error.⁸ Where the bill is taken *pro confesso*, if a decree be passed not confined to the matter of the bill, it may be attacked on ap-

¹ Winship v. Jewett, 1 Barb. Ch. 173, 183; Goodhue v. Churchman, 1 Barb. Ch. 596.

² Goodhue v. Churchman, 1 Barb. Ch. 596; Bowman v. Bowman, 64 Ill. 75.

³ Wager v. Stickle, 3 Paige Ch. 407.

⁴ 2 Daniell, 805; Thomson v. Wooster, 114 U. S. 104-120.

⁵ 2 Daniell, 805.

⁶ Thomson v. Wooster, 114 U. S. 104-120.

⁷ Thomson v. Wooster, 114 U. S. 104-120; Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83-92; Frow v. De La Vega, 82 U. S. 552-554; Masterson v. Howard, 85 U. S. 99, 106; Brown, Bonnell & Co. v. Lake Superior Iron Co., 134 U. S. 530, 536; O'Hara v. McConnell, 93 U. S. 150.

⁸ Thomson v. Wooster, 114 U. S. 104-120; Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 92.

peal for that reason.¹ On appeal the decree may be attacked for any *fatal* defect in the record, as that the defendant against whom the order *pro confesso* was taken was at the time an infant, or that the final decree was taken before the expiration of the time limited for defendant to answer.² Facts not found in the allegations of the bill are inadmissible to affect the decree on appeal.³

¹ Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 92.

³ Thomson v. Wooster, 114 U. S. 114-120.

² O'Hara v. McConnell, 93 U. S. 150.

CHAPTER IX.

MANNER IN WHICH A SUIT MAY BE DEFENDED.

§ 172. The defenses to a bill, and the order in which they are made.

§ 172. The defenses to a bill, and the order in which they are made.—The defendant having entered his appearance in the suit on a rule-day, his counsel has until the next rule-day to examine the bill, and to determine upon and prepare and file the defense to the suit.¹ The defenses to a suit in equity may be by either of the following modes: (1) The defendant may by demurrer demand the judgment of the court whether he shall be compelled to answer the bill or not. (2) He may by plea show some cause why the suit should be dismissed, delayed or barred. (3) By answer controverting the case stated by the plaintiff, he may confess and avoid, or traverse and deny the several parts of the bill; or, admitting the case made by the bill, may submit to the judgment of the court upon it, or upon a new case made by the answer, or both. (4) By disclaimer he may at once terminate the suit by disclaiming all right in the matter sought by the bill. And all or any of these modes may be joined, provided each relates to a separate and distinct part of the bill.² An equity rule provides that: "The defendant may at any time before the bill is taken for confessed, or afterward with leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination and the facts on which the charge is founded."³ If the defendant desires to file

¹ Equity Rule 18.

² Redesdale (6th Am. ed.), 127; 1 Smith's Ch. Pr. 127; Story's Eq. Pl., secs. 433, 434, 435, 436; Livingstone v. Story, 9 Pet. 657; Leacraft v.

Dempry, 4 Paige Ch. 125; Clark v. Phelps, 6 Johns. Ch. 214; 2 Daniell, 1, 3.

³ Equity Rule 32.

exceptions to the bill for scandal and impertinence, or for either, he should do so before making defense to it.¹

The successive steps which may be taken by the defendant, and the order in which they may be taken, are as follows: (1) He may file exceptions to the bill for scandal and impertinence, or for either. (2) He may demur to the bill. (3) He may plead to the bill. (4) He may answer the bill. (5) He may disclaim all right to the matter sought by the bill. Or after his exceptions to the bill for scandal and impertinence are disposed of, he may demur to a part of the bill, plead to a part, answer to a part, and disclaim as to a part; but each of these defenses should relate to a separate part of the bill.²

¹ Equity Rule 27.

435, 436; *Livingstone v. Story*, 9 Pet.

² Equity Rules 18, 27, 32; *Redesdale* (6th Am. ed.), 127; 1 *Smith's Ch. Pr.* 127; *Story's Eq. Pl.*, secs. 433, 434,

657; *Leacraft v. Dempry*, 4 *Paige Ch.* 125; *Clark v. Phelps*, 6 *Johns. Ch.* 214; 2 *Daniell*, 1, 3.

CHAPTER X.

FILING EXCEPTIONS TO THE BILL FOR SCANDAL AND IMPERTINENCE.

§ 173. Objections for scandal and impertinence, how taken.

174. When exceptions for scandal and impertinence must be filed.

§ 175. Filing exceptions, and procedure thereon.

176. Principles which control in deciding upon exceptions for scandal and impertinence.

§ 173. Objections for scandal and impertinence, how taken.

“Neither scandal nor impertinence, however gross it may be, is a ground for demurrer, it being a maxim of pleading that *utile per inutile non vitiatur*. Where, however, there is scandal or impertinence in a bill, the defendant is entitled to have the record purified by expunging the scandalous and impertinent matter.”¹ This objection must be taken by exceptions to the bill.² An equity rule provides that if any bill contains any “impertinent matter, or any scandalous matter not relevant to the suit, . . . it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal, and, if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.”³

§ 174. When exceptions for scandal and impertinence must be filed.—The first step that may be taken by a defendant, after entering his appearance, is the filing of exceptions to the bill for scandal and impertinence. If, after examining the plaintiff’s bill, the defendant’s counsel is of opinion that it contains scandal and impertinence, and he desires to have the

¹ 1 Daniell, 456, 457; *Stirrat v. Excelsior Mfg. Co.*, 44 Fed. R. 142; *Machinery Co. v. Brown Folding Machine Co.*, 46 Fed. R. 72.

² 1 Daniell, 456-460; 1 Smith’s Ch. Pr. 570-575.

³ Equity Rule 26.

same expunged, he must, before interposing any defense to the bill, and on or before "the next rule-day after the process on the bill shall be returnable," file exceptions to the bill for that purpose. An equity rule provides that: "No order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding, pending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination."¹ This equity rule is substantially the same as the eleventh and twelfth of the English chancery orders of April, 1828,² which introduced a material change in the English practice. Prior to the English orders the practice was "for the defendant to move the court for an order to have the bill referred to a master to report whether it was scandalous or impertinent. This reference was obtained of course, and being general, without specifying the particular passages objected to, obviously precluded the party whose pleading was alleged to be scandalous from exercising any judgment upon the subject, much less from submitting to have the objectionable passages expunged." To remedy this evil the above ordinances were promulgated.³

§ 175. Filing exceptions, and procedure thereon.—After stating the court in which the cause is pending, and the style and number thereof, the exceptions should contain, substantially, the following caption: Exceptions taken by the defendant to the original bill (or amended bill) filed in this cause by the plaintiff, for scandal or impertinence (or both);⁴ and such exception should describe the particular passage in the bill thereby objected to as scandalous or impertinent,⁵ which

¹ Equity Rule 27.

² 2 Smith's Ch. Pr. 444.

³ 1 Daniell, 456, 457.

⁴ 2 Smith's Ch. Pr. 619.

⁵ Equity Rule 27.

may be done by identifying the word, line and folio where the same begins and ends;¹ and the exceptions should conclude with a prayer that the scandalous and impertinent matter be expunged, and should be signed by counsel and filed with the clerk,² and an entry thereof should be made on the order book.³ Immediately upon filing the exceptions, the defendant's counsel should prepare and present to a judge of the court an application for an order referring the exceptions to a master of the court for his examination and report; the application should state facts showing that the exceptions have been filed within the time and in the manner required by the rules of the court, and should be sworn to, or be accompanied by a certificate of the clerk as to the dates, respectively, of the return-day of the writ and the filing of the exceptions; and upon the presentation of the application the order of reference will be made as of course.⁴ The order may be made at chambers in vacation,⁵ and, when made, should be entered on the order book.⁶ Immediately upon the entry of the order of reference, the defendant's counsel should cause the exceptions to be presented to the master for hearing, and if the defendant's counsel omit to do so the plaintiff's counsel shall be at liberty forthwith to cause proceedings to be had thereon before the master;⁷ and the master should report thereon on or before the next rule-day, or certify that further time is necessary.⁸ The master to whom is referred the bill and exceptions should exercise his judgment upon the case and certify his opinion thereon to the court. This certificate is in the nature of a report to the court, no draft of which is necessary, as a party dissatisfied with the master's determination may take the opinion of the court thereon, without objections before the master, by filing exceptions to the report and bringing it on to a hearing before the court in that shape.⁹ Exceptions to the master's report must be filed within one month from the time of filing the report.¹⁰ If the master certifies the bill to be scandalous or impertinent,

¹ 2 Smith's Ch. Pr. 619.

² Equity Rules 26, 27.

³ Equity Rule 4.

⁴ Equity Rules 26, 27.

⁵ Equity Rule 1; U. S. R. S., sec. 638.

⁶ Equity Rule 4.

⁷ Equity Rule 74.

⁸ Equity Rule 27.

⁹ 1 Daniell, 457-459; 2 Smith's Ch. Pr. 160, 161.

¹⁰ Equity Rule 83.

and his report is not excepted to, or if, being excepted to, his certificate and opinion are sustained by the court, the scandalous and impertinent matter will be expunged.¹ But before the repudiated matter can be expunged, another order is necessary, referring the bill back to the master to expunge the parts which he has certified to be scandalous or impertinent; and thereupon the master will proceed to expunge the scandalous or impertinent matter, by striking his pen through it, and setting his initials against the clause expunged.² The adverse party is entitled to notice to attend at the office of the master when he expunges the scandalous and impertinent matter.³

§ 176. Principles which control in deciding upon exceptions for scandal and impertinence.—An “exception cannot be partially allowed, and therefore if part of an exception be good, and the rest bad, the whole exception must be overruled.”⁴ The best rule to ascertain whether matter be impertinent is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties.⁵ “The court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be specially clear that it is such as ought to be struck out of the record, for the reason that the error on one side is irremediable, on the other not. If the court strikes it out of the record it is gone, and the party may then have no opportunity of placing it there again; whereas, if it is left on the record, and is prolix or oppressive, the court at the hearing of the cause has power to set the matter right in point of costs. That consideration has been alluded to by Lord Eldon in *Parker v. Fairlie*, and other cases. It ought to be clear to demonstration that the matter complained of is impertinent before that which, if wrong, is irremediable, is done.”⁶

“In examining the question whether an allegation or statement in the bill is relevant or pertinent, it must be recollected that a bill in chancery is not only a pleading for the purpose of bringing before the court and putting in issue the material

¹ Equity Rule 26.

² 1 Daniell, 458, 459.

³ 1 Smith's Ch. Pr. 572.

⁴ 1 Daniell, 457.

⁵ Wood v. Morril, 1 Johns. Ch. 103.

⁶ Davis v. Cripps, 2 Y. & Coll. Ch. 443.

allegations and charges upon which the complainant's right to relief rests, as in a declaration in a suit at law, but is also, in most cases, an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the complainant's case, or to counterprove or destroy the defense which may be set up by such defendant in his answer. The plaintiff may, therefore, state any matter of evidence in the bill, or any collateral fact, the admission of which, by the defendant, may be material in establishing the general allegations of the bill, as a pleading, or in ascertaining or determining the nature and the extent and the kind of relief to which the plaintiff may be entitled, consistently with the case made by the bill, or which may legally influence the court in determining the question of costs. And where any allegation or statement contained in the bill may thus affect the decision of the cause, if admitted by the defendant, or established by the proof, it is relevant, and cannot be excepted to as impertinent."¹

¹Hawley v. Wolverton, 5 Paige Ch. 522, 525; Mechanics' Bank v. Levy, 3 Paige Ch. 606.

CHAPTER XI.

DEMURRERS.

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| <p>§ 177. The time allowed defendant to file his defense to the bill.</p> <p>178. Demurrers in equity borrowed from the common law.</p> <p>179. Lord Redesdale's definition of a demurrer to a bill in equity.</p> <p>180. Classification of demurrers to relief by Lord Redesdale.</p> <p>181. Another classification of demurrers to relief.</p> <p>182. Same—Demurrers to the jurisdiction.</p> <p>183. Same—Demurrers to the person of plaintiff.</p> <p>184. Same—Demurrers to the substance of the bill.</p> <p>185. Same—Demurrers to the form of the bill.</p> <p>186. Demurrer that the subject is not appropriate for the exercise of judicial power.</p> <p>187. Same subject continued.</p> <p>188. Demurrer that the subject of the suit is not within the jurisdiction of a court of equity.</p> <p>189. Same—Lord Redesdale's summary of the equitable jurisdiction.</p> <p>190. Demurrer that some other court of equity has the proper jurisdiction.</p> <p>191. Demurrer for want of federal jurisdiction.</p> <p>192. Demurrer that the plaintiff has no title to the character in which he sues.</p> <p>193. Demurrer for incapacity of plaintiff to sue alone.</p> | <p>§ 194. Demurrer for defect of parties.</p> <p>195. Demurrer for multifariousness.</p> <p>196. Demurrer for laches.</p> <p>197. Demurrer based on the statute of limitations.</p> <p>198. Demurrer based on the statute of frauds.</p> <p>199. Classification of demurrers to discovery.</p> <p>200. Consequences of not demurring to discovery.</p> <p>201. Demurrer to bills not original.</p> <p>202. General and special demurrers.</p> <p>203. Same—In equity must express the causes.</p> <p>204. Demurrer <i>ore tenus</i>.</p> <p>205. Statement of the extent of the demurrer.</p> <p>206. A demurrer bad in part is bad in whole.</p> <p>207. Demurrer and answer to the same matter.</p> <p>208. Demurrer too restricted.</p> <p>209. Admissions made by the demurrer.</p> <p>210. Speaking demurrers.</p> <p>211. Form of demurrer.</p> <p>212. Certificate of counsel and affidavit of defendant.</p> <p>213. Filing, setting down and hearing demurrers.</p> <p>214. Effect of allowing a demurrer.</p> <p>215. Effect of overruling a demurrer.</p> <p>216. No demurrers in equity to answer and pleas.</p> |
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§ 177. **The time allowed defendant to file his defense to the bill.**—It is provided by an equity rule that “it shall be the duty of the defendant, unless the time shall otherwise be enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk’s office, on the rule-day next succeeding that of entering his appearance.”¹ It is, however, provided by another equity rule that: “The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to a part, plead to a part, and answer as to the residue.”² Under the provisions of these rules the defendant should file his defense on the rule-day next succeeding that on which he enters his appearance; but if the defendant make default, and the plaintiff fail to take advantage of the default by entering an order *pro confesso* on the next rule-day, as he may do of course,³ the defendant may still, without leave of court, plead, demur or answer at any time before the order *pro confesso* is actually entered, and afterwards with leave of the court.

But the rule requiring the defendant to file his defense on the rule-day next succeeding his appearance is flexible, and must yield when exceptions are filed to the bill for scandal and impertinence. The defendant is not bound to file his defense until the bill has been purified from scandal and impertinence; and, as such exceptions must be filed on or before the next rule-day after the process on the bill shall be returnable, the duty of the defendant to make defense is, in such case, postponed until the exceptions have been disposed of, and the bill returned to the files by the master.⁴

§ 178. **Demurrers in equity borrowed from the common law.**—There was no demurrer in the civil-law system of pleading; before a pleading could be filed the party offering it was required to submit it to a judge, who passed upon its legal sufficiency and directed it to be amended and filed, or filed without amendment, as the case required. Demurrers in equity

¹ Equity Rule 18.

² Equity Rule 32.

³ Equity Rule 18.

⁴ Equity Rules 26, 27; *Nedby v. Nedby*, 11 Eng. Ch. 465.

are borrowed from the common law,¹ and, in treating this subject, it is therefore important to state the general nature of a demurrer to the declaration at common law prior to any legislation by parliament upon that subject. (1) A demurrer to the declaration at common law did not deny the facts therein averred, but, on the contrary, admitted on the argument all the facts well pleaded, and referred the questions of law arising upon them to the judgment of the court. The demurrer denied the legal sufficiency of the declaration and tendered an issue of law to be decided by the court. (2) At common law demurrers were general or special: general, when no particular cause was assigned; special, when the particular imperfection was pointed out and insisted upon as the ground of demurrer. At common law a special demurrer was not necessary except in cases of duplicity; but upon a general demurrer the party could assign any grounds of demurrer *ore tenus* at the bar and could take advantage of all manner of defects, whether of substance or of form, that of duplicity only excepted. If a demurrer was interposed for duplicity, it was not sufficient to say that the pleading was double, or contained two matters, but the party demurring was required to show specially in what the duplicity consisted. (3) At common law a demurrer was either to the whole or to a part only of the declaration. If a demurrer was to the whole declaration, some part of which was good and some part was bad, the demurrer would be overruled. Thus, if a declaration in covenant contained several distinct assignments of breaches of covenant, some of which were sufficient and others not, or if the declaration contained several counts and only one was bad, the defendant could only demur to the defective assignment of breach, or to the insufficient count, and if the demurrer went to the whole declaration it would be overruled. (4) A party could not demur unless the defect or objection appeared on the face of the pleading without reference to extrinsic matter; but in some cases, where the plaintiff in his declaration partially states a deed or bond which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed or bond and set forth the whole, thereby making it part of the declaration, and then

¹ Langdell's Eq. Pl., secs. 92, 93.

demur either in respect of the defect in the deed or bond, or the improper manner in which the plaintiff has stated it.¹

§ 179. Lord Redesdale's definition of a demurrer to a bill in equity.—“Whenever any ground of defense is apparent on the bill itself, either from matter contained in it or from defect in its frame, or in the case made by it, the proper mode of defense is by demurrer. A demurrer is an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. The causes of demurrer are merely upon matter in the bill, or upon the omission of matter which ought to be therein or attendant thereon; and not upon any foreign matter alleged by the defendant. The principal ends of a demurrer are to avoid a discovery which may be prejudicial to the defendant, to cover a defect of title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer. For, in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases in which the court has given relief upon hearing, though a demurrer to the relief would probably have been allowed. But the cases are rare.”² This definition has been, in the main, followed by subsequent writers on the subject.³

§ 180. Classification of demurrers to relief by Lord Redesdale.—Demurrers to relief were classified by Lord Redesdale as follows: 1. That the subject of the suit is not within the jurisdiction of a court of equity. 2. That some other court of equity has the proper jurisdiction. 3. That the plaintiff is not

¹ Tidd's Prac. 647-650; 1 Chitty's Pl. (9th Am. ed.) 661-665; Gould's Pl. 428-430. ² Maddock's Ch. 224, 225; 2 Daniell, 19; Story's Eq. Pl., secs. 446, 447, 448; 1 Smith's Ch. Pr. 201.

³ Redesdale (6th Am. ed.), 128-130.

entitled to sue by reason of some personal disability. 4. That the plaintiff has no interest in the subject, or no title to institute a suit concerning it. 5. That the plaintiff has no right to call on the defendant concerning the subject of the suit. 6. That the defendant has not that interest in the subject of the suit which can make him liable to the claims of the plaintiff. 7. That for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays. 8. The deficiency of the bill to answer the purposes of complete justice. 9. The impropriety of confounding distinct subjects in the same bill, or of unnecessarily multiplying suits.¹ This classification was followed, substantially, by Smith in his work on Chancery Practice.²

§ 181. Another classification of demurrers to relief.—Cooper, Daniell and Story have classified demurrers to relief substantially as follows: 1. To the jurisdiction. 2. To the person of the plaintiff. 3. To the matter of the bill, either as to its substance or as to its form and frame.³ And these they have again made the subject of subordinate divisions, which will be presented in the four following sections.

§ 182. Same — Demurrers to the jurisdiction.—Demurrers to the jurisdiction are subdivided as follows: 1. That the subject is not cognizable by any municipal court of justice. 2. That the subject is not within the jurisdiction of a court of equity. 3. That some other court of equity is invested with the proper jurisdiction. 4. That some other court possesses the proper jurisdiction; as that the subject-matter of the suit is within the jurisdiction of either (1) a court of common law; (2) the ecclesiastical court; (3) the court of admiralty or commissioners of prize; (4) the court of bankruptcy; (5) some statutory jurisdiction.⁴

§ 183. Same — Demurrers to the person of plaintiff.—Demurrers to the person of the plaintiff are subject to the follow-

¹ Redesdale (6th Am. ed.), 131.

² 1 Smith's Ch. Pr. 201, 202.

³ Cooper, Eq. Pl. 118 et seq.; Story's Eq. Pl., secs. 466-544; 2 Daniell, 24-46. The classification of the grounds of demurrers to relief stated in this

and the four sections following are taken from Daniell (1st ed.) and Story's Eq. Pl. (10th ed.).

⁴ Story's Eq. Pl., secs. 467-492; 1 Daniell, 28-34.

ing subordinate division: 1. That the plaintiff is not entitled to sue by reason of some personal disability which is apparent on the face of the bill, as where an infant, or a married woman, an idiot, or a lunatic exhibiting a bill appears on the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill. 2. That the plaintiff has no title to the character in which he sues; as, where it positively appears upon the face of the bill that the plaintiff suing as an executor has not proved the will of his testator, or has proved it in a foreign court; or that the plaintiff sues as administrator in virtue of the grant of administration in a foreign court; or where an unincorporated association of persons sues in the style and character of a corporation.¹

§ 184. Same — Demurrers to the substance of the bill.— Demurrers to the substance of the bill are: 1. That the plaintiff has no interest in the subject-matter of the suit, or no proper title to institute a suit concerning it. 2. That although the plaintiff has an interest in the subject-matter of the suit, and a title to institute a suit concerning it, yet he has no right to call upon the defendant to answer his demand. 3. That the defendant has no interest in the subject-matter of the suit. 4. That the plaintiff is not entitled to the relief which he has prayed. 5. That the value of the subject-matter is beneath the dignity of the court. 6. That the bill does not embrace the whole matter. 7. That there is want of proper parties. 8. That the bill is multifarious, and improperly confounds distinct demands. 9. That the plaintiff's remedy is barred by length of time. 10. That the object of the bill is to enforce a penalty or a forfeiture. 11. That it appears by the bill that there is another suit pending for the same matter.²

§ 185. Same — Demurrers to the form of the bill.— The grounds of demurrer to the form of the bill are: 1. The plaintiff's place of abode is not stated. 2. The facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively. 3. The bill is deficient in certainty. 4. The plaintiff does not by his bill offer to do equity where the rules of the

¹Story's Eq. Pl., secs. 493-498; 2 ²2 Daniell, 35-45; Story's Eq. Pl., Daniell, 34; Redesdale (6th Am. ed.), secs. 499-527.
176-181.

court require that he should do so, or to waive penalties or forfeitures where the plaintiff is in a situation to make such waiver. 5. The want of counsel's signature to the bill. 6. The absence of the proper affidavit in those cases in which the rules of the court require that the plaintiff's bill should be accompanied by such an instrument.¹

§ 186. Demurrer that the subject is not appropriate for the exercise of judicial power.—The subject-matter of a suit in equity must be judicial and not political, or the bill will be demurrable. The distinction between judicial power and political power is acknowledged and maintained in the jurisprudence of both England and this country.² Under the British constitution, and the constitution of the United States and the several states, the powers of government are divided into three distinct co-ordinate departments: the legislative, the executive, and the judicial, and each of them is confided to a separate magistracy.³ By the federal constitution the judicial power is vested in one supreme court, and in such inferior courts as congress may ordain and establish, and the political power of the government is vested in the other two departments. And it is provided that the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority.⁴ But, to invoke the action of the judicial department of the government, a case must be presented appropriate for the exercise of judicial power; the rights in danger and sought to be protected by the suit must be rights of persons or property, and not merely political rights; and where a bill and the prayer thereof for relief call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political nature, the court possesses no jurisdiction over the subject-matter presented, and the bill will be demurrable, or may be dismissed upon motion.⁵

¹ 2 Daniell, 45; Story's Eq. Pl., secs. 527-544.

² New York v. Connecticut, 4 Dall. 4; Cherokee Nation v. Georgia, 5 Pet. 1; Georgia v. Stanton, 6 Wall. 50, 78; Nabob of Carnatic v. East India Co., 1 Ves. Jr. 375; s. c., 2 Ves. Jr. 56; Penn v. Lord Baltimore, 1

Ves. Sr. 446; Story's Eq. Pl., secs. 468-471.

³ Federalist, Nos. XLVI, XLVII, XLVIII, XLIX, L; U. S. Const., arts. I, II, III, and constitutions of the several states.

⁴ U. S. Const., art. III, sec. 2.

⁵ Georgia v. Stanton, 6 Wall. 50-78.

The state of Georgia filed an original bill in equity in the supreme court of the United States against the secretary of war, the general of the army and the commander of the third military district, consisting of the states of Georgia, Florida and Alabama, which district was organized under the acts of congress of March 2, 1867, entitled "An act to provide for the more efficient government of the Rebel States," and an act of the 23d of the same month supplementary thereto, commonly called the "Reconstruction Acts," for the purpose of restraining the defendants from carrying into execution the several provisions of those acts. The bill averred and insisted that the intent and design of the acts of congress, as apparent on their face and by their terms, were to overthrow and annul the existing state government, and to erect another and different government in its place, unauthorized by the constitution and in defiance of its guaranties, and that the defendants, acting under orders of the president, were about to take military possession of the state, subvert its government, and subject its people to military rule, and asking the assistance and decree of the court to restrain the defendants from executing in the state of Georgia the provisions of the acts mentioned. It was held by the court that the matters involved and presented for adjudication were political and not judicial, and therefore not the subject of judicial cognizance; and the bill was, upon motion of the attorney-general, dismissed. Delivering the opinion of the court, Justice Nelson said: "A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *Rhode Island v. Massachusetts*, 12 Pet. 669. It is claimed that the court has no jurisdiction over the subject-matter set forth in the bill or over the parties defendant. And, in support of the first ground, it is urged that the matters involved and presented for adjudication are political and not judicial, and therefore not the subject of judicial cognizance. The distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the constitution. The judicial power is vested in one supreme court, and in such inferior courts as congress may ordain and establish; the political power of the

government in the other two departments. The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and this country that we need do no more than refer to some of the authorities on the subject. They are all in one direction. . . . By the second section of the third article of the constitution, the judicial power extends to all cases, in law and equity, arising under the constitution, the laws of the United States, and, as applicable to the case in hand, to controversies between a state and the citizens of another state, which controversies, under the judiciary act, may be brought in the first instance before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction; that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity. The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained. . . . That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of

a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the court.”¹

§ 187. Same subject continued.—The executive department of the government is charged with the foreign relations of the United States, including the execution and enforcement of treaty stipulations entered into with other nations; this is a political power—the power and jurisdiction of sovereignty. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts can have nothing to do and can give no redress.² A controversy between two nations concerning a national boundary line is not a judicial question, but a political question for the political department of the government. There being no common tribunal to decide between them, each determines for itself its own rights, and if they cannot adjust their differences peaceably the right remains with the stronger. The judiciary is not the department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights according to those principles which the political departments of the government have established;³ and the executive department of the United States government having, in its foreign correspondence, and in

¹ *Georgia v. Stanton*, 6 Wall. 50–78.

³ *Foster v. Neilson*, 2 Pet. 253;

² *Edye v. Robertson*, 112 U. S. 580; *United States v. Arredondo*, 6 Pet. 691; *s. c.*, 8 Pet. 711; *Garcia v. Lee*, 12 Pet. 511; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415.
Foster v. Neilson, 2 Pet. 253; *Soulard v. United States*, 4 Pet. 511; *United States v. Percheman*, 7 Pet. 50; *United States v. Arredondo*, 6 Pet. 691; *Garcia v. Lee*, 12 Pet. 511.

the messages of the president to congress, denied the right of Buenos Ayres to the ownership and sovereignty of the Falkland Islands, it was not competent for a circuit court of the United States, in a suit upon a contract of marine insurance, to inquire into and ascertain by other evidence the title of the government of Buenos Ayres to the sovereignty of those islands; the action of the executive was conclusive upon the judicial department.¹ But a treaty may confer upon or secure to the subjects and citizens of the contracting powers private rights, which are capable of enforcement as between private parties in the courts of the country; in such case the treaty stipulations, conferring or securing private rights, partake of the nature of municipal law, to which the court resorts for a rule of decision for the case before it as it would to a statute. The constitution of the United States makes the treaty a part of the supreme law of the land in all courts where such private rights are to be tried. But so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of the country, it is subject to such acts as congress may pass for its enforcement or modification.² If an act of congress is in conflict with a treaty made between the United States and a foreign nation, the courts of the United States are bound to follow the statutory enactments of their own government instead of the treaty; and the judicial department of the government, in cases involving Mexican grants, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. If such treaty has been violated by act of congress it is a matter of international concern, which the two nations must determine by treaty, or by such other means as enable one nation to enforce upon another the obligations of a treaty.³ The power to levy, collect and disburse taxes is a political power and does not belong to a court of equity; and a bill in equity calling upon the court to assume the executive authority of the state, so far as it relates to the enforcement of a law, and

¹ Williams v. Suffolk Ins. Co., 13 Pet. 415.

United States v. Peggy, 16 Cranch, 103.

² Edye v. Robertson, 112 U. S. 580;

³ Botiller v. Dominguez, 130 U. S. 238, 256.

to supervise the conduct of persons charged with official duty in respect to the levy, collection and disbursement of taxes, is demurrable.¹ The power to prescribe a tariff of rates for carriage by a common carrier is a legislative power and not a judicial power. An inquiry whether rates of carriers are reasonable or not is a judicial act; but to prescribe rates for the future is a legislative act. Congress has not transferred to the Interstate Commerce Commission the power to prescribe a tariff of rates for carriage by common carriers, and therefore the commission cannot invoke the judicial power to enforce any such tariff by it prescribed.²

§ 188. Demurrer that the subject of the suit is not within the jurisdiction of a court of equity.—The subject-matter of every original bill in equity filed in the United States circuit courts must be within the jurisdiction of a court of equity, or the bill will be demurrable;³ and if a plain defect of equitable jurisdiction appears at the hearing or on appeal, a court of equity will not make a decree, even though no demurrer has been filed.⁴ The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States.⁵ The constitution of the United States, in creating and defining the judicial power of the general government, establishes the distinction between law and equity, and a party who claims a legal title must proceed at law; but if his claim is an equitable one he must proceed in equity, and according to the rules of equity procedure prescribed by the supreme court of the United States.⁶ The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of the common law and equity, as distinguished and defined in that country from which we derived our knowledge of those

¹ *Heine v. Levee Com'rs*, 19 Wall. 655; *Louisiana v. Jumel*, 107 U. S. 711. 73 U. S. 134, 137; *Tyler v. Savage*, 143 U. S. 79; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662; *Lewis v. Cocks*, 23 Wall. 466.

² *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 512. ⁵ *Noonan v. Bradley*, 67 U. S. 499–509.

³ *Whitehead v. Shattuck*, 138 U. S. 146; *Smyth v. New Orleans Canal & Banking Co.*, 141 U. S. 656. ⁶ *Bennett v. Butterworth*, 11 How. 669, 674.

⁴ *Thompson v. Central Ohio R. Co.*,

principles.¹ It is provided by the sixteenth section of the original judiciary act: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;"² but the adequate remedy at law which is the test of the equitable jurisdiction of the courts of the United States is that which existed in England at the time of the enactment of the original federal judiciary act, approved September 24, 1789.³ Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury;⁴ but the remedy at law, in order to exclude the jurisdiction in equity, must be as practical and as efficient to the ends of justice, and its prompt administration, both in respect to the final relief and the mode of obtaining it, as the remedy which equity would afford under the same circumstances.⁵ While the rule is thoroughly settled that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts, yet an enlargement of equita-

¹Thompson v. Railroad Cos., 6 Wall. 134, 137; Robinson v. Campbell, 3 Wheat. 212; Ferin v. Holme, 21 How. 481-486; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 580; Hooper v. Scheimer, 23 How. 235; Sheirburn v. Cordova, 24 How. 423; Scott v. Neely, 140 U. S. 106.

²1 U. S. Stat. at L., ch. 20, sec. 16, p. 82; U. S. R. S., sec. 723.

³1 U. S. Stat. at L., ch. 20, sec. 16, p. 82; U. S. R. S., sec. 723; Buzard v. Houston, 119 U. S. 347; McConihay v. Wright, 121 U. S. 201; Whitehead v. Shattuck, 138 U. S. 146; Scott v. Neely, 140 U. S. 105; Smyth v. New Orleans Canal & Banking Co., 141 U. S. 656; Tyler v. Savage, 143 U. S. 79; Kilbourn v. Sunderland, 130 U. S. 505; Litchfield v. Ballou, 114 U. S. 190; Root v. Lake Shore & Mich. S. R. Co., 105 U. S. 189; Killian v. Eb-

binghaus, 110 U. S. 568; Sullivan v. Portland & K. R. Co., 94 U. S. 806; Payne v. Hook, 7 Wall. 425; Thompson v. Central Ohio R. Co., 6 Wall. 134; Oelrichs v. Williams, 15 Wall. 211; Shields v. Barrow, 17 How. 130; Hipp v. Babin, 19 How. 271; Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545; Dade v. Irwin, 2 How. 383; Magniac v. Thompson, 15 How. 281; Hayward v. Andrews, 106 U. S. 672; New York Guaranty & Ind. Co. v. Memphis Water Co., 107 U. S. 205; Ferin v. Holme, 21 How. 481; Van Norden v. Morton, 99 U. S. 378; Francis v. Flynn, 118 U. S. 385.

⁴Buzard v. Houston, 119 U. S. 347, 355; U. S. Const., 7th Amend.

⁵Kilbourn v. Sunderland, 130 U. S. 505; Tyler v. Savage, 143 U. S. 79; Gormley v. Clark, 134 U. S. 338.

ble rights by state statute may be administered by the circuit courts of the United States; and where the case is one involving a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.¹

§ 189. Same — Lord Redesdale's summary of the equitable jurisdiction.— Lord Redesdale, in his discussion of demurrers, makes the following summary of the subjects that are within the jurisdiction of a court of equity: "It may be collected that the jurisdiction, when it (a court of equity) assumes the power of decision, is to be exercised: (1) Where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose. (2) Where the courts of ordinary jurisdiction are made instruments of injustice. (3) Where the principles of law by which the ordinary courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. And it may also be collected that courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction." (4) To remove impediments to the fair decision of a question in other courts. (5) To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests. (6) To restrain the assertion of doubtful rights in a manner productive of irreparable damage. (7) To prevent injury to a third person by the doubtful title of others. (8) To put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction. (9) To compel a discovery, or obtain evidence which may assist the decisions of other courts; and (10) To preserve testimony when in danger of being lost before

¹ *Gormley v. Clark*, 134 U. S. 338; 557; *Clark v. Smith*, 13 Pet. 195; *Shelf Broderick Will Case*, 21 Wall. 503, *field Furnace Co. v. Witherow*, 149 520; *Holland v. Challen*, 110 U. S. 574, 580. U. S. 574, 580.
15, 25; *Frost v. Spitley*, 121 U. S. 552,

the matter to which it relates can be made the subject of judicial investigation.”¹

§ 190. Demurrer that some other court of equity has the proper jurisdiction.—This ground of demurrer arose out of the peculiar features of the English judicial system. Regarding it Lord Redesdale said: “It has been before noticed that the establishment of courts of equity has obtained throughout the whole system of our judicial polity, and that most of the inferior branches of that system have their peculiar courts of equity, the court of chancery assuming a general jurisdiction in cases not within the bounds or beyond the power of inferior jurisdictions. The principal of the inferior jurisdictions in England are those of the counties palatine of Chester, Lancaster and Durham, and the court of great session in Wales, the courts of the two universities of Oxford and Cambridge, the courts of the city of London and of the cinque-ports. These are necessarily bounded by the locality either of the subject of the suit or of the residence of the parties litigant. Where the circumstances occur which give them jurisdiction they have exclusive jurisdiction in matters of equity as well as matters of law; and they have their own peculiar courts of appeal, the court of chancery assuming no jurisdiction of that nature, though it will in some cases remove a suit before the decision into the chancery by writ of *certiorari*. When, therefore, it appears on the face of the bill that another court of equity has the proper jurisdiction, either immediately or by way of appeal, the defendant may demur to the jurisdiction of the court of chancery. Thus, to a bill of appeal and review of a decree in the court of the county palatine of Lancaster the defendant demurred, because on the face of the bill it was apparent that the court of chancery had no jurisdiction; and the demurrer was allowed. But demurrers of this kind are very rare, for the want of jurisdiction can hardly appear on the face of the bill, at least so conclusively as is necessary to deprive the chancery, a court of general jurisdiction, of cognizance of the suit; and a demurrer for want of jurisdiction founded on the locality of the subject of the suit, which alone can exclude the jurisdiction of the chancery in a matter cognizable in a court

¹ Redesdale (6th Am. ed.), 132, 133.

of equity, has even been treated as informal and improper. This, however, can only be considered as referring to cases where circumstances may give the chancery jurisdiction, and not to cases where no circumstance can have that effect. Thus, the counties palatine have their peculiar and exclusive courts of equity under certain peculiar circumstances, which will be more fully considered in another place. The court of chancery will not interfere when all those circumstances attend the case, and they are shown to the court; though if those circumstances are not shown, or if they are not shown in proper time, and the defendant, instead of resting upon them and declining the jurisdiction, enters into the^e defense at large, the court, having general jurisdiction, will exercise it. But where no circumstance can give the chancery jurisdiction, as in the case alluded to of a bill of appeal and review of a decree in a county palatine, it will not entertain the suit, even though the defendant does not object to its deciding on the subject."¹ The English High Court of Chancery was a superior court of general equity jurisdiction, and it was a maxim of that court that "nothing shall be intended to be out of its jurisdiction which is not shown to be so."²

Beames, discussing the jurisdiction of the superior and inferior courts of equity of England, said: "The superior courts of equity have not jurisdiction where the inferior courts of equity have jurisdiction over the matter;" and, after enumerating the inferior courts, he continues: "As so very little is found in Lord Redesdale's work on this subject, it may be useful to observe that some of the above peculiar jurisdictions are founded on prescription, some on positive statutes, and some on particular charters; and the old books abound in subtile distinction with reference to the circumstances of the foundation, and its effect in excluding or not excluding the jurisdiction of the superior courts of Westminster Hall. It is not, therefore, quite accurate to treat all of these peculiar jurisdictions as equally co-extensive in excluding the jurisdiction of the superior courts; and the cases to which we have referred will suffice both to prove the correctness of this observation, and at the same time to show the particular objections that may be taken in each of

¹Redesdale (6th Am. ed.), 174-176.

²Redesdale (6th Am. ed.), 262-264.

these limited jurisdictions. There are, however, a few exceptions to the jurisdiction of these inferior courts, which, though sometimes stated as exceptions to the jurisdiction of some of them by name, appear of a very general nature, and applicable more or less to all of these limited jurisdictions. Previously to our attempting to state them, the reader will observe that, independently of the peculiar circumstances required by its charter, to enable each of the above limited jurisdictions to decide the matter, it seems to be a general proposition that the subject-matter ought to be within their jurisdiction, and the litigating parties resident within it. Having made this general remark, we proceed to state the exceptions which are laid down in the books when referring only to some of these jurisdictions, but which appear more or less applicable to all of them." The author then states the following exceptions which oust the jurisdiction of the inferior courts of equity and vest the jurisdiction in the High Court of Chancery, namely: (1) Where the judge of the inferior equitable jurisdiction is himself a party to the suit. (2) Where the defendant does not reside in the county palatine. (3) Where the subject-matter of the suit is not within the jurisdiction, bounds or power of the inferior court of equity. (4) When the suit is "for things transitory, although they in truth be within the county palatine, the plaintiff may by law allege them to be done in any place within England, and the defendant may not plead to the jurisdiction of the court that they were done within the county palatine. (5) Inferior jurisdictions cannot exclude the superior courts of Westminster in matters where the crown is concerned. (6) Nor will an objection that an inferior court has jurisdiction be allowed to oust the cognizance of the superior courts, where, although some of the defendants are entitled to have the matter decided by such inferior court, there are other defendants not so entitled."¹

From the discussions above quoted of the objection "that some other court of equity has the proper jurisdiction," it appears that the principle involved, and the practice arising out of it, are peculiar to the English judicial system. As a part of this system there was: (1) A superior court of equity, possess-

¹ Beames' Pleas in Equity, 82-90.

ing general equity jurisdiction throughout England and Wales. (2) There were inferior courts of equity of local and limited equity jurisdiction. (3) The superior and inferior courts of equity were all created by the same sovereignty, and were a part of the same system of courts, and derived their powers from, and exercised their judicial functions under, the same authority. It is therefore clear that this ground of exceptions to the jurisdiction, derived from the English judicial system, is not technically applicable in the federal courts in either their relations to each other or to the state courts, because: (1) The federal and state courts are created by, and derive their powers from, separate and distinct authorities, and constitute separate and distinct systems of courts; and (2) there is not in the federal system a superior court of general equitable jurisdiction with inferior courts of local and limited equitable jurisdiction, as in the English system; but (3) as will be shown in the next succeeding section, all of the United States courts are courts of special and limited jurisdiction, deriving their powers from the constitution and laws of the United States; and where a bill in equity is filed in the circuit court of the United States, stating a cause of equitable cognizance, but not one falling within the class of cases confided by the United States constitution and laws to the federal courts, then in such case the defendant should demur to the bill, not upon the ground "that some other court of equity has the proper jurisdiction," but upon the ground that there is a want of federal jurisdiction.¹

§ 191. Demurrer for want of federal jurisdiction.—A bill in equity filed in the circuit courts of the United States may state a case clearly within the jurisdiction of a court of equity, and yet be demurrable. It is not sufficient that the subject of the suit be one of equitable cognizance; but the bill must go farther, and, by proper averments of the jurisdictional facts, show that the suit belongs to a class of cases over which the jurisdiction is, by the constitution and laws of the United States, vested in the federal circuit courts, or the bill will be demurrable. This rule of pleading results from the all-pervading principle of federal jurisprudence, that the jurisdiction of the federal courts is derived from, and depends alone upon, the

¹ *Post*, § 191.

constitution and laws of the United States; it is a special and limited jurisdiction, and there are no presumptions in its favor, but every case is presumed to be without the jurisdiction of such courts unless the contrary affirmatively appears from the record. The equity jurisdiction of the United States circuit courts is derived from and defined by the constitution and laws of the United States, is the same in all the states, and is not affected or varied by state statutes and regulations which define the equity powers and jurisdiction of the state courts. This principle of federal jurisprudence is axiomatic. It therefore follows as a logical necessity that every bill in equity in the federal courts must aver the jurisdictional facts which show the case to be one confided by the constitution and laws of the United States to the court whose jurisdiction is invoked, or a demurrer will lie. And, indeed, it is the duty of all the courts of the United States, upon their own motion, to deny their own jurisdiction over all cases where it is not made to affirmatively appear, whether or not a defect of jurisdiction is suggested by the parties. The duty of the federal courts in this respect is made imperative by express statutory provisions.¹

§ 192. Demurrer that the plaintiff has no title to the character in which he sues.—An administrator who has been appointed and obtained letters of administration, or an execu-

¹ U. S. Const., art. 3, sec. 2; 24 U. S. Stat. at L., ch. 373, secs. 1, 6, pp. 434-437; 25 U. S. Stat. at L., ch. 866, secs. 1, 6, pp. 550-552; 18 U. S. Stat. at L., ch. 137, sec. 5, p. 470; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96; *Ex parte Smith*, 94 U. S. 455; *Metcalf v. Watertown*, 128 U. S. 586; *Bors v. Preston*, 111 U. S. 252, 263; *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 378, 389; *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U. S. 225, 227; *Hancock v. Holbrook*, 112 U. S. 231; *Taylor v. Life Ass'n*, 112 U. S. 719; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 239; *Tennessee v. Union & P. Bank*, 125 U. S. 454; *Brown v. Keene*, 8 Pet. 115; *Capron v. Van Noorden*, 2 Cranch, 126; *Turner v. Bank of North America*, 4 Dall. 11;

Godfrey v. Terry, 97 U. S. 171; *Hornthall v. Keary*, 9 Wall. 560; *Sullivan v. Steamboat Co.*, 6 Wheat. 450; *Smith v. Lyon*, 133 U. S. 315, 320; *Southern Pacific Co. v. Denton*, 146 U. S. 202; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 453; *Re Keasby & Mattison Co.*, 160 U. S. 221, 231; *Jackson v. Ashton*, 8 Pet. 148; *Strettel v. Ballow*, 9 Fed. R. 256; *American Ass'n, Lim., v. Eastern Kentucky Land Co.*, 68 Fed. R. 721; *United States v. Drennan*, Hemp. 320, Fed. Cas. No. 14,992; *The Orleans v. Phoebus*, 11 Pet. 175; *Carey v. Curtis*, 3 How. 393; *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *Scott v. Sandford*, 16 How. 393-633; *Johnson v. Christian*, 125 U. S. 645.

tor who has proved the will and obtained letters testamentary, in one state cannot, by virtue of such appointment and letters, maintain an action or suit in another state, in the absence of a statute of the latter state giving effect to such appointment and letters, to enforce an obligation or right in favor of his intestate or testator; if he desires to prosecute a suit in another state, he must first obtain a grant of administration, or prove the will and obtain letters therein, in accordance with its laws. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the state within which it is granted. All hold that, in the absence of such statute, no suit can be maintained by an administrator in his official capacity except within the limits of the state from which he derives his authority. The doctrine is applicable alike to both executors and administrators; the right to sue in both instances depending upon the letters.¹ And if an executor or administrator file a bill as such outside of the territorial jurisdiction of the state or country within which his letters were granted, and the defect fully appears upon the face of the bill, advantage of such defect can be taken by demurrer.²

§ 193. Demurrer for incapacity of plaintiff to sue alone.

In the English chancery practice, when a bill was filed to recover the property of a married woman, if that property had not been settled to her separate use, it was necessary that both husband and wife should be joined in the bill as co-plaintiffs, and if they were not both so joined the bill was demurrable. The reasons for this rule were: (1) By the principles of the common law, upon marriage the property of the wife vested in the husband, and he acquired substantial rights in it, and was therefore a necessary party; and (2) the court of chancery, standing *in loco parentis*, and in the exercise of parental care over the wife, recognized the equity of the wife to a settlement for the support of herself and children out of her own property which had by marriage and the law of the land been bestowed

¹Noonan v. Bradley, 9 Wall. 394-408; Fenwick v. Sears' Adm'rs, 1 Cranch, 259; Dixon's Ex'rs v. Ramsey's Ex'rs, 3 Cranch, 319. ²Black v. Henry G. Allen Co., 42 Fed. R. 623-625; Redesdale (6th Am. ed.), 180, 181; 1 Daniell, 416, 417.

upon the husband, and would not make a decree in favor of the husband until he had consented to such settlement, or until the wife had been given an opportunity to elect whether the property should be decreed to her husband or settled upon her and her children.¹ But a bill filed for the recovery of the separate estate of the wife should be in her name as plaintiff by her next friend, and the husband should be made a defendant. The reasons of this rule are: (1) That, as to property settled to her separate use, a married woman is, in equity, a *feme sole*, and is entitled to prosecute a suit regarding it upon her own authority, independently of her husband; (2) a bill filed in equity by the husband in the name of himself and his wife is considered as the suit of the husband merely, and the decree does not bind the wife, and cannot be pleaded in bar to a subsequent suit by her and her next friend against the same defendants, although the relief prayed is the same in both suits; (3) a bill by a married woman to recover property as her separate estate and settled to her separate use is, in fact, a suit against the husband, inasmuch as it is inconsistent with his common-law marital rights. And, under the English rule, if the husband join as co-plaintiff in the bill touching the separate estate of the wife, the defendant may demur; but if the objection is taken by demurrer, the court will allow an amendment, by striking out the name of the husband as plaintiff and making him a defendant, and by inserting the name of some other person as next friend of the wife.² The rule as announced by the supreme court of the United States allows the husband to be named in the bill as the next friend of the wife, in suits touching her separate estate, where his acts are not complained of;³ and it has been held by the circuit courts in New Jersey and North Carolina that a married woman must sue and be sued jointly with her husband, unless she claims some right in opposition to him, when in such case her next friend, with her consent, may sue

¹ 1 Daniell, 118-121.

² 1 Daniell, 126, 150, 155; Story's Eq. Pl., sec. 63; Wake v. Parker, 1 Keen. 59; England v. Downs, 1 Beav. 99; Owden v. Campbell, 8 Sim. 551; Sigel v. Phelps, 7 Sim. 239; Thorp v. Yeates, 1 Y. & C. Ch. 438; Davis v. Prout, 7 Beav. 288; Roberts v. Evans,

7 Ch. D. 830; Dewall v. Covenhoven, 5 Paige Ch. 581; Alston v. Jones, 3 Barb. Ch. 397; Ludlow v. Maddock, 1 Ch. Sent. 20; Grant v. Van Schoonhoven, 9 Paige Ch. 255; Bowers v. Smith, 10 Paige Ch. 193.

³ Bein v. Heath, 6 How. 228.

on her behalf, and her husband be made a party defendant.¹ If an infant, an idiot or lunatic sue without a next friend or committee being named in the bill, a demurrer will lie, and the objection extends to the whole bill, and advantage may be taken of it in a bill for discovery merely as well as in a bill for relief.²

§ 194. Demurrer for defect of parties.—In the federal courts parties are classified as: (1) Formal parties, who are those persons who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation, and may be made parties or not, at the option of the plaintiff. (2) Necessary parties, who are those persons who have an interest in the controversy, but whose interests are separable from those of the parties before the court or the immediate litigants, and will not be directly affected by a decree which does complete and full justice between them; such persons should be made parties if practicable, but if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree without them. (3) Indispensable parties, who are those persons who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience; and in such case the court refuses to entertain the suit, when the parties cannot be subjected to its jurisdiction.³ And if it appear upon the face of the bill that there is a defect of parties it may be taken advantage of by demurrer.⁴ A demurrer for want of parties must show who are the proper parties; not indeed by name, for

¹ *Douglass v. Butler*, 6 Fed. R. 228; *Wall*, 450; *Coiron v. Millaudon*, 19 *Taylor v. Holmes*, 14 Fed. R. 498. *How.* 113; *Williams v. Bankhead*, 19

² *Daniell*, 34, 35; *Redesdale* (6th *Wall*, 563; *Kendig v. Dean*, 97 U. S. *Am. ed.*), 176, 177. 423; *Alexander v. Horner*, 1 *McCrary*, 634, *Fed. Cas. No.* 169.

³ *Shields v. Barrow*, 17 *How.* 130, 139; *Barney v. Baltimore*, 6 *Wall*. 280, 291; *Chadbourn v. Coe*, 51 *Fed. ed.*), 206, 207; *Story v. Livingston*, 13 *R.* 80, 81; *Ribon v. Railroad Cos.*, 16 *Pet.* 359, 375.

that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties.¹ But if a bill, by proper averment, show a sufficient reason for not bringing a formal or necessary party before the court, it will not be demurrable.²

But the equity rules provide such a speedy and simple method of raising and disposing of a defect of parties in the bill, by a suggestion of such defect in the answer, and an immediate hearing thereon, that a demurrer for such cause is unnecessary. By one of these rules it is provided that: "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order books, in the form or to the effect following, that is to say: Set down upon the defendant's objection for want of parties. And where the plaintiff shall not set down his cause, but shall proceed therewith to a hearing notwithstanding an objection for want of parties taken by answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."³ And another rule provides that: "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties."⁴ These rules are literal copies of the fifty-second and fifty-third of the English chancery orders of 1841. Courts of equity are always unwilling to turn a plaintiff out of court on the objection for want of parties made at the final hearing. If they deem it essential that a person should be made a party who has not been made such, they will generally allow the cause to stand over in order that he may be brought in.⁵

¹ Redesdale (6th Am. ed.), 208.

³ Equity Rule 52.

² Equity Rule 47; Redesdale (6th Am. ed.), 207; *Union Bank of Louisiana v. Stafford*, 12 How. 327.

⁴ Equity Rule 53.

⁵ *Townsend Savings Bank v. Epping*, 3 Woods, 390, Fed. Cas. No.

§ 195. Demurrer for multifariousness.—If separate, distinct and different matters, having no connection with each other, are joined in one bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested, and which are not so connected with the matters in which they are interested as to render it proper for the convenient administration of justice to litigate and dispose of the whole in one suit, the bill will be demurrable for multifariousness; but if the object of the suit be single, but different persons have separate interests in distinct questions which arise out of the single object, or if the bill presents a common point of litigation, in which all of the parties are interested, and the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit, although the defendants have separate interests in distinct questions arising out of the suit, the bill will not be demurrable for multifariousness.¹ This objection should always be taken by demurrer, and must be determined by the structure of the bill alone.²

§ 196. Demurrer for laches.—It is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked; in such case a court of equity will decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave

14,120 (opinion by Bradley, Circuit Justice).

¹ Daniell, 439-451; Newland v. Rogers, 3 Barb. Ch. 432, 436; Kelley v. Boettcher, 85 Fed. R. 64; Hoyden v. Thompson, 71 Fed. R. 60, 67; Chaffin v. Hull, 39 Fed. R. 887; Prentice v. Storage Co., 58 Fed. R. 437, 441; Barcus v. Gates, 89 Fed. R. 791; Curran v. Champion, 85 Fed. R. 68, 70; Pullman v. Stebbins, 51 Fed. R. 10;

First Nat. Bank v. Moore, 48 Fed. R. 799; Northern Pacific R. Co. v. Walker, 47 Fed. R. 681; Chase v. Cannon, 47 Fed. R. 674; Gaines v. Chew, 2 How. 619; Groves v. Corbin, 132 U. S. 526; Binkershoff v. Brown, 6 Johns. Ch. 139; Fellows v. Fellows, 4 Cow. 682-702. See *ante*, §§ 130, 131, 132, 133.

² Nelson v. Hill, 5 How. 127; Gaines v. Chew, 2 How. 619.

him to such remedies as he may have in a court of law.¹ No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights.² Laches does not, like limitation, grow out of the mere passage of time, but out of the inequity of permitting a claim to be enforced, arising from some change in the condition or relations of the property or parties.³ While it is true that, by reason of the differences of facts in the adjudicated cases, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed upon the assumption

¹ *Abraham v. Ordway*, 158 U. S. 416, 423; *Wagner v. Baird*, 7 How. 234; *Harwood v. Cincinnati & C. A. L. R. Co.*, 17 Wall. 78, 81; *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806, 811; *Brown v. Buena Vista County*, 95 U. S. 157, 159; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 617; *Lansdale v. Smith*, 106 U. S. 391, 392; *Speidel v. Henrick*, 120 U. S. 377, 387; *Richards v. Mackall*, 124 U. S. 183, 188; *Darcy's Ex'rs v. Cheney*, 34 U. S. App. 56, 57.

² *Hammond v. Hopkins*, 143 U. S. 224, 274; *Marsh v. Whitmore*, 21

Wall. 178; *Lansdale v. Smith*, 106 U. S. 293; *Norris v. Hoggin*, 136 U. S. 386; *Mackall v. Casilear*, 137 U. S. 556; *Hanrier v. Moulton*, 138 U. S. 486; *Halsey v. Cheney*, 68 Fed. R. 763; *Alsop v. Riker*, 155 U. S. 448, 461; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573, 582.

³ *Alsop v. Riker*, 155 U. S. 448, 461; *Galliher v. Caldwell*, 145 U. S. 368, 376; *Bartlett v. Ambrose*, 78 Fed. R. 839; *Halstead v. Grinnan*, 152 U. S. 412, 425; *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685-701.

that the party to whom laches is imputed had knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of the delay the adverse party had good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the adverse party to permit the party guilty of the delay to assert his alleged rights.¹ The defense of laches is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that the alleged rights either never existed or had long since ceased. The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. There must of course have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. And yet the defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable dili-

¹ Galliber v. Caldwell, 145 U. S. 368, 376; Penn Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685-701.

gence to have informed himself of all the facts.¹ The mere institution of a suit does not of itself relieve a person from the charge of laches; and if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun.²

If it appears upon the face of the bill that the plaintiff is chargeable with laches in the assertion of his rights, the defect may be taken advantage of by demurrer. Laches is a defense which may be made by demurrer or by plea, or by answer, or presented by argument, either upon a preliminary or final hearing, or the court may upon its own motion refuse to consider plaintiff's case where it appears that he is chargeable with laches.³

§ 197. Demurrer based on the statute of limitations.—When the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a court of equity. And where it appears upon the face of the bill that the case which it makes is barred by the statute of limitations, and the plaintiff states no circumstances which take the case out of the operation of the statute, the defendant may take advantage of the defect by demurrer, and is not bound to plead or answer.⁴ If the plaintiff desires to avoid the operation of the statute by bringing his case within some exception to it, the facts which bring the case within the exception should be explicitly alleged in the bill, or in an amended bill if the bill as originally drawn

¹Halstead v. Grinnan, 152 U. S. 412, 425; Foster v. Mansfield, C. & L. M. R. Co., 146 U. S. 88.

²Johnston v. Standard Min. Co., 148 U. S. 360.

³Woodmance & Hewitt Mfg. Co. v. Williams, 68 Fed. R. 489; McLaughlin v. Railway Co., 21 Fed. R. 574; Maxwell v. Kennedy, 8 How. 222; Richards v. Mackall, 124 U. S. 183, 189; Badger v. Badger, 2 Wall. 87; Sullivan v. Portland & K. R. Co., 94 U. S. 811; Coddington v. Pensacola & Ga. R. Co., 103 U. S. 409; Penn Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685-701.

⁴Rhode Island v. Massachusetts,

15 Pet. 233; Piatt v. Vattier, 9 Pet. 405; Mercantile Nat. Bank v. Carpenter et al., 101 U. S. 567, 568; Coddington v. Pensacola, etc. R. Co., 103 U. S. 409; Merrill v. Town of Monticello, 66 Fed. R. 163, 169; Hinchman v. Kelley, 54 Fed. R. 63, 67; Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 454; Ilett v. Collins, 103 Ill. 74; Bell v. Johnson, 111 Ill. 374; Wisner v. Ogden, 4 Wash. 631, Fed. Cas. No. 17,914; Van Hook v. Whitlock, 7 Paige Ch. 373; Humbert v. Trinity Church, 7 Paige Ch. 195; 2 Daniell, 42, 45; Story's Eq. Pl., secs. 484, 503, 751.

contains no suitable allegation to meet the bar.¹ If it do not clearly and distinctly appear from the bill that the suit is barred by limitation, a demurrer setting up such bar should be overruled, although the facts when fully developed on the trial may establish such defense.² As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*.³ But this rule is in accordance with the reason upon which it is founded, and subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust*; as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other.⁴ In cases of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law.⁵ Courts of equity sometimes act in obedience to the statute, and sometimes apply it by way of analogy. Where the cause of action is legal and the statute has barred the remedy at law, the defense is as complete in equity as at law; but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the statute is not necessarily applied.⁶ In a case over which there was concurrent jurisdiction at law and in equity, decided by the supreme court of New York in 1822, Spencer, Chief Justice, discussing the application of the statute of limitations to trusts, said: "I am aware that courts of equity do take cognizance of matters of account, but not as upon a trust. They do so because it is supposed that

¹ Piatt v. Vattier, 9 Pet. 405; Humbert v. Trinity Church, 7 Paige Ch. 195.

² Bacon v. Rives, 106 U. S. 99, 108; Muir v. Trustees of the Leake and Watts Orphan House, 3 Barb. Ch. 477.

³ Prevost v. Gratz, 6 Wheat. 481; Lewis v. Hawkins, 23 Wall. 119, 126; Railroad Co. v. Durant, 95 U. S. 576; Speidel v. Henrici, 120 U. S. 377, 390.

⁴ Kane v. Bloodgood, 7 Johns. Ch. 90, 124; Robinson v. Hook, 4 Mason, 139, 152, Fed. Cas. No. 11,956; Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 789; Oliver v. Piatt, 3 How. 333; Speidel v. Henrici, 120 U. S. 377, 390.

⁵ Speidel v. Henrici, 120 U. S. 377, 390.

⁶ Riddle v. Whitehall, 135 U. S. 621, 640.

courts of law could not give so complete a remedy as courts of equity; and by degrees they have assumed a concurrent jurisdiction. The same relief is given at law in the action of account as under a bill in equity. The delay at law has transferred a very considerable portion of this jurisdiction to courts of equity. . . . All, however, I mean to deduce from this consideration is that it is impossible in a case like this, where there was ample remedy at law, that the change of the forum should produce such a change in the rights of a party; for, beyond all doubt, had the respondents sued at law the appellants could have pleaded the statute; whether successfully, or not, remains to be considered. I have therefore no hesitation in saying that in a case where there is a concurrent jurisdiction in the courts of common law and of equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in the one court as the other. In cases of trust and fraud, peculiarly, appropriately and exclusively the objects of equity jurisdiction, according to the established doctrine, the statute cannot be pleaded.”¹ In one of Justice Story’s judgments in a case decided in 1826, in the circuit, involving the application of the statute of limitations to trusts, he said: “The next point of defense relied on is the general statute of limitations of Massachusetts and Maine, in respect to personal actions, limiting those founded on simple contracts to six years. It is said that the statute of limitations is not a bar to suits in equity, but only to suits at law. In respect to cases purely of equitable jurisdiction and equitable rights, this may be true in a strict sense; but even then courts of equity adopt the analogy of the statute of limitations, and hold the equitable right barred by the same lapse of time which would bar it if it were a legal right. Of course, if there are other equitable considerations which upon principle ought to avoid the bar, courts of equity will recognize them, but if the case is naked the bar is unhesitatingly applied. But in cases of concurrent jurisdiction, as of accounts, where the party may proceed either at law or in equity, it appears to me that the statute of limitations applies with equal force in both courts. If it be not a positive bar in equity, it seems entitled to the same universality of application in equity as it would have at law.

¹ *Murray v. Coster*, 20 Johns. 576-586, Book 6, Lawry. Ed. 1123-1125.

It would otherwise follow that a legal right might be extinct at law and yet of validity in equity under exactly the same circumstances, and stripped of all grounds for conscientious interference. This distinction appears to me deserving of consideration, and has entered somewhat into the doctrines supported by the more recent and exact authorities. . . . The present bill is, in substance, a bill for an account of moneys received for the use of plaintiff; and as far as any moneys are shown by the proofs to have been received, the receipt was more than six years before the filing of the bill. . . . The bill alleges no promise within six years. . . . In this posture of the case, the principal argument relied upon to avoid the effect of the statutable bar is that the present is a case of trusts, and trusts are not within the statute of limitations. . . . But when it is said that the statutes of limitation do not apply to cases of trusts, it is material to consider the sense in which the proposition is to be understood. In respect to trusts, which are strictly such, and recognized and enforced in courts of equity only, such as express trusts created by the parties for particular purposes, the doctrine is, in general, true. So long as the relation of trustee and *cestui que trust* is admitted in cases of express trust to exist between the parties, the very duties to be performed by the trustee prohibit him, in general, from setting up such a bar. Acts which, done by a stranger, might be deemed adverse, when done by a trustee admit of a very different interpretation. But even in cases of express trust, if an open, public, adverse claim is set up by the trustee against his *cestui que trust*, and the trust itself is denied as any longer subsisting, there is much reason to hold that the bar ought to be admitted to arise from such period. Certain it is that if the trustee recognizes another person as the *cestui que trust*, long possession and continued enjoyment of the property under such recognition will entitle the substituted *cestui que trust* to set it up as a bar in equity. That was the decision in the great case of *Cholmondeley v. Lord Clinton*, and furnished a rule for all cases falling under the like analogy. But as to cases of merely constructive trusts created by courts of equity, or cases which in a sense are created for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations

does not embrace them. If it were otherwise there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar and may be pleaded to a suit in equity as well as at law. If there be any contrariety in the authorities on this subject, the more recent appear to be settled on the most solid foundations.”¹

§ 198. Demurrer based on the statute of frauds.—Where a bill in equity is filed to enforce an agreement, and such agreement is by the statute of frauds made void unless it is in writing, and it appears upon the face of the bill that the contract sued on is in parol, the bill is demurrable, and the defendant may interpose the defense of the statute of frauds in that form.² The statute of frauds does not alter the rules of pleading. It is a rule of pleading at law, and which has been adopted in equity, that where the nature of a conveyance or transfer or agreement is such that it would at common law be valid without deed or writing, there no deed or writing need be averred, though such document may in fact exist; but where the nature of the conveyance, transfer or agreement requires at common law a deed or other written instrument, such instrument, where it is the foundation of the suit, must be alleged. And the statutes of fraud which require deeds and agreements to be in writing, and which were not by the common law required to be so evidenced, introduced rules of evidence and not rules of pleading; and, therefore, where the statute makes writing necessary to a matter where it was not so at the common law, it is not necessary to plead the thing to be in writing, though it must be proved to be so evidenced. And if the plaintiff in his bill states that an agreement was made, and does not allege that it was by parol, on demurrer to the bill the agreement will be presumed to have been reduced to writing and signed by the par-

¹ Robinson v. Hook, 4 Mason, 139, v. Black, 109 Mass. 496; Campbell v. Fed. Cas. No. 11,956. Brown, 129 Mass. 23; Cozine v. Gra-

² Randall v. Howard, 2 Black, 585; ham, 2 Paige Ch. 177.
Walker v. Locke, 5 Cush. 90; Slack

ties or their agents, unless the contrary appears.¹ The rule upon this subject is laid down by Chancellor Walworth as follows:

“The rule of pleading on this subject is well settled in the courts of law; and I do not see why the principle of that rule is not equally applicable to this court. It is there held that the statute did not alter the form of pleading; that if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied the plaintiff must produce legal evidence of its existence, which can only be done by producing a written agreement, duly executed according to the provisions of the statute. If the agreement is admitted by the pleadings no evidence to prove its existence is necessary, and the court never inquires whether it was or was not in writing. Even there I presume the defendant might demur if it distinctly appeared by the declaration that the agreement or promise was one which was not legally binding on him. There was formerly some difficulty on this subject in chancery on account of the idea which prevailed that the court was bound to carry into effect a parol agreement admitted by the answer, although the defendant at the same time insisted that it was not legally binding, as being within the statute. It now appears to be settled that the defendant may admit the existence of the parol agreement, but insist upon the statute in his answer as a bar to any relief founded thereon, unless there has been such a part performance as to take the case out of the operation of the statute. If the agreement as stated in the bill appears to be a parol agreement only, and no sufficient grounds are alleged to take the case out of the statute, the defendant may by demurrer object to any relief founded thereon. But if it is stated generally that an agreement or contract was made, the court will presume it was a legal contract until the contrary appears; and the defendant must either plead the fact that it was not in writing, or insist upon that defense in his answer. He may then require the production of legal evidence to prove the existence of the contract. If he admits the agreement in his answer, and does not insist upon the statute, no evidence of the agreement will be neces-

¹1 Daniell, 471-474; Cozine v. Graham, 2 Paige Ch. 177; Champlin v. Parish, 11 Paige Ch. 405.

sary, and the decree will be made upon the admission."¹ Where a thing or right is originally created by an act of the legislature, and required to be in writing, a bill filed to enforce such right must allege the act to be in writing, with all the circumstances required by the act, or it will be demurrable; and, therefore, a devise of land which was not permitted at common law, and is only allowed by statute, must always be alleged to be in writing in compliance with the statute.²

§ 199. Classification of demurrers to discovery.—The objections to a bill which are causes of demurrer to discovery only are: 1. That the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery, as that: (1) the discovery is sought in aid of the prosecution or defense of a suit or proceeding not purely civil in its nature; (2) or the discovery is sought in aid or defense of a purely civil proceeding in a court of ordinary jurisdiction which can compel the discovery required; (3) or the discovery is sought to be used in support of an action, the prosecution of which is against public policy; (4) or the bill does not allege that the discovery sought is in aid of a proceeding either pending or intended to be instituted in the ordinary tribunals of justice and in regard to matters of a purely civil nature. 2. That the plaintiff has no interest in the subject or no interest which entitles him to call on the defendant for a discovery, as that: (1) the bill seeks a discovery in aid of an action, or a defense to an action, at common law, and that such action or defense, as stated in the bill, is not maintainable. 3. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery, as that: (1) the bill, as appears from its face, is filed against a person for the discovery of a matter concerning which he is a mere witness, and who has no interest in the subject-matter of the suit; (2) the bill is filed in support of an action or defense at common law, and the defendant to the bill is not a party to the suit at law. 4. Although both plaintiff and defendant may have an interest in the subject-matter, yet that there is no privity of title between them which gives the plaintiff a right to the discovery required by the bill, as that: (1) the title of the

¹ Cozine v. Graham, 2 Paige Ch. 177.

² 1 Daniell, 473, 474.

defendant is not in privity, but inconsistent with the title made by the plaintiff, and that therefore the defendant is not bound to discover the evidence of the title under which he claims. This objection is founded upon the rule that, although a plaintiff has a right to a discovery or production of documents which tend to make out his own title affirmatively, he has no right to a discovery or production of documents which are not immediately connected with his own title, and which form part of his adversary's title. But this rule will not extend to defeat the plaintiff of his right to a discovery from the defendant, where he makes a case in his bill which, if admitted, would disprove the truth of or otherwise invalidate the defense made to the bill. 5. That the discovery, if obtained, cannot be material, as that: (1) the bill is filed to obtain a discovery in support of an action, or defense to an action, at common law, and that it appears from the face of the bill that the discovery, if obtained, would not be relevant testimony to any issue in the action at law; (2) or the bill is filed for relief and for discovery in aid of the relief, and it appears from the face of the bill that the discovery sought, if obtained, cannot be relevant to any material issue presented by the bill. 6. That the situation of the defendant renders it improper for a court of equity to compel a discovery, as that: (1) the discovery may expose the defendant to a penalty or forfeiture, or to a criminal accusation; (2) or it appears from the face of the bill that the knowledge of the facts of which discovery is sought was derived from the confidence reposed in the defendant, as counsel, attorney, solicitor or arbitrator; (3) or it clearly appears from the face of the bill that the defendant has in conscience a right equal to that claimed by the plaintiff, though not clothed with the legal title, and to give the discovery called for would hazard his own title.¹

§ 200. Consequences of not demurring to discovery.—“If the grounds on which a defendant might demur to a particular discovery appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering the rest of the bill, declines answering to so much, the court will

- Redesdale (6th Am. ed.), 219-236; 2 Daniell, 45-65; 1 Smith's Ch. Pr. 203, 204; Story's Eq. Pl., secs. 545-610.

not compel him to make the discovery.”¹ It is provided by a United States equity rule that: “A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.”² “But, in general, unless it clearly appear by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant, unless he can protect himself by plea, must answer.”³

§ 201. Demurrer to bills not original.—As every bill not original is the consequence of an original bill, many of the causes of demurrer which will apply to an original bill will also apply to every other kind; but the peculiar object and form of each kind afford distinct causes of demurrer to each.⁴ Demurrers to bills not original may be classified as follows: 1. Supplemental bill may be demurred to for the following causes: (1) That the plaintiff in the supplemental bill does not stand in privity of title with the original plaintiff. (2) That the supplemental bill is brought upon matter arising before the filing of the original bill, and while the suit is in that stage of proceeding that the bill may be amended. (3) That it appears from the face of the supplemental bill that it is brought upon matter arising subsequent to the time of filing the original bill, against a person who claims no interest arising out of the matters in litigation by the former bill. (4) That the new matters contained in the supplemental bill are not material to the relief sought under the original bill. (5) That the purpose for which the supplemental bill is brought is not properly supplemental to the matters already in litigation, but that the bill seeks to make a new and different case from the original bill upon new matter.⁴ 2. Bills of revivor may be demurred to for (1) the want of privity; (2) for want of sufficient interest in the

¹ Redesdale (6th Am. ed.), 236; 2 Daniell, 65.

² Equity Rule 44.

³ Redesdale (6th Am. ed.), 236; 2 Daniell, 65.

⁴ Redesdale (6th Am. ed.), 238.

⁵ Redesdale (6th Am. ed.), 239; Story's Eq. PL., secs. 612-616.

party seeking to revive, or (3) for some imperfection in the frame of the bill.¹ 3. A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent bill. The cross-bill is auxiliary to the proceeding in the original suit and a dependency upon it.² A cross-bill may be demurred to for the following causes: (1) That the cross-bill is not germane to the original bill.³ (2) That the facts alleged in the cross-bill are nothing more than a defense to the case made by the original bill, and, if proved, could afford the defendant no affirmative relief; and that the facts alleged in the cross-bill may be made available by the defendant in his answer in response to the allegations of the original bill, and his rights fully protected by the court upon the hearing of the original bill.⁴ (3) That the case set up in the cross-bill is inconsistent with the defense made in the answer.⁵ (4) That the cross-bill is filed contrary to the usual course and practice of the court; as that it is filed after the publication of the testimony in the original suit, and contains no submission to go to the hearing upon the proof already taken.⁶ (5) A cross-bill cannot be used to intro-

¹ Redesdale (6th Am. ed.), 238; Fed. R. 331; Stonemetz P. M. Co. v. Story's Eq. Pl., secs. 617-627. Brown F. M. Co., 46 Fed. R. 851; Pacific R. Co. v. Cutting, 27 Fed. R. 638;

² Ayers v. Carver, 17 How. 591; Cross v. De Valle, 1 Wall. 5; Ex parte Railroad Co., 95 U. S. 221; Shields v. Barrow, 17 How. 130. Slater v. Cobb, 153 Mass. 22; Hurd v. Case, 32 Ill. 45; Lund v. Skanes Enskelda Bank, 96 Ill. 181; Krueger v. Ferry, 41 N. J. Eq. 432.

³ Ayers v. Carver, 17 How. 591; Cross v. De Valle, 1 Wall. 5; Ex parte Railroad Co., 95 U. S. 221; Shields v. Barrow, 17 How. 130; Story's Eq. Pl., sec. 631; Ayers v. Chicago, 101 U. S. 187; Kingsbury v. Buckner, 134 U. S. 650; Morgan's L. & C. Co. v. Texas C. R. Co., 137 U. S. 171; Rerner v. McKay, 38 Fed. R. 164; Johnson R. S. Co. v. Union Switch & S. Co., 43 Wing v. Goodman, 75 Ill. 159; Newberry v. Blatchford, 106 Ill. 584; Beck v. Beck, 43 N. J. Eq. 39.

⁴ Morgan v. Smith, 11 Ill. 194; Jackson v. Grant, 18 N. J. Eq. 146; Graham v. Tankersly, 15 Ala. 634; Story's Eq. Pl., sec. 632.

⁵ Field v. Shieffelin, 7 Johns. Ch. 250; Story's Eq. Pl., sec. 632.

duce new parties into the cause, and if such attempt be made a demurrer will hold.¹ But a demurrer for want of equity will not hold to a cross-bill filed by a defendant in a suit against the plaintiff in the same suit touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to show a ground of equity to support its jurisdiction, a cross-bill being generally considered as a defense.² 4. A bill of review brought to reverse a decree for errors of law apparent of record may be demurred to for the following causes: (1) That the bill fails to show any error in the decree sought to be reviewed.³ (2) That the bill does not show that the plaintiff is aggrieved by the error in the decree assigned.⁴ (3) That the bill of review was not filed within the time limited by statute for taking an appeal from the decree sought to be reviewed.⁵ 5. A bill of review brought to reverse a decree upon new matter may be demurred to for the following causes: (1) That the new matter is not relevant.⁶ (2) That the plaintiff was guilty of laches or negligence in not discovering the new matter before the rendition of the decree which he seeks to reverse.⁷ 6. A bill to impeach a decree for fraud may be demurred to for the following causes: (1) That the bill does not set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed upon.⁸ (2) That the facts and circumstances stated in the bill do not amount to a fraud.⁹

§ 202. General and special demurrers.—As we have already seen, demurrers at common law were general or special: general, when no particular cause was assigned; special, when

¹ Shields v. Barrow, 17 How. 130.

² Redesdale (6th Am. ed.), 239, 240.

³ Redesdale (6th Am. ed.), 240; Story's Eq. Pl., sec. 634.

⁴ Whiting v. Bank of United States, 13 Pet. 6.

⁵ Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207-227; Enslinger v. Powers, 108 U. S. 292; Thomas v. Brockenbrough, 10 Wheat. 146; Whiting v. Bank of United

States, 13 Pet. 6; Kennedy v. Bank of Georgia, 8 How. 586; Ricker v. Powell, 100 U. S. 104; Clark v. Kilian, 103 U. S. 766; Story's Eq. Pl., sec. 635; Reed v. Stanley, 89 Fed. R. 430; Reed v. Stanley, 97 Fed. R. 521.

⁶ 2 Smith's Ch. Pr. 63.

⁷ Beard v. Burts, 95 U. S. 434.

⁸ United States v. Atherton, 103 U. S. 372.

⁹ Story's Eq. Pl., sec. 639.

the particular imperfection was pointed out and insisted upon as the ground of demurrer. General demurrers were to the substance, special demurrers were to the form of the pleading. Special demurrers were, however, never necessary, except in cases of duplicity; but upon general demurrer the party demurring might take advantage of all manner of defects, that of duplicity only excepted.¹ But to avoid the surprises incident to such a system of pleading, the statutes of jeofails were passed.² And the result of these statutes was that, by a general demurrer, a party could take advantage of defects in substance only, and defects of form could be taken advantage of by special demurrer only.³ Those statutes also had the effect to require greater particularity in expressing the cause of special demurrers. In regard to the effect of these statutes it is said: "But to constitute a special demurrer, within the statute of Elizabeth, some specific cause of demurrer must not only be assigned, but must be assigned and set out specially. The assignment of a cause in general terms does not answer the requirement of the statute, which is that the cause be specially and particularly set down. Hence, a demurrer for duplicity, assigning for cause merely that the pleading demurred to is double and informal, is considered as a general demurrer, and will not reach the fault mentioned. The demurrer for such cause should point out, specially and precisely, where, and in what particular, the duplicity consists. And the same particularity is necessary in all demurrers for faults in mere form. For the object proposed, in requiring a demurrer, in any case, to be special, is that the precise point in which the fault in the pleading demurred to consists be designated as a cause of demurrer."⁴

The thirty-second section of the original federal judiciary act embodies substantially the principles and provisions of the British statutes of jeofails, and requires that, in all demurrers for defects in the form of pleading, the imperfections, defects and want of form complained of shall be by the party demurring specially set down and expressed together with his demurrer as the causes thereof.⁵ This statute applies alike to

¹ Tidd's Prac. 247, 248; 1 Chitty's Pl. (9th Am. ed.) 662.

⁴ Gould's Pl. (4th ed.) 434.

² 27 Eliz., ch. 5; 4 & 5 Anne, ch. 16.

⁵ 1 U. S. Stat. at L., ch. 20, secs. 32,

91; U. S. R. S., sec. 954.

³ 1 Tidd's Prac. 648-650; 1 Chitty's Pl. (9th Am. ed.) 663.

suits in equity¹ and actions at common law;² and under it the United States supreme court has held, in an action at law, that defects in substance may be taken advantage of by general demurrer, but defects of form should be taken advantage of by special demurrer. Speaking by Justice Wayne, the court said: "A general demurrer lies only for defects in substance, and exceptions to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular grounds of exception."³

§ 203. Same — In equity all demurrers must express the causes.— By the English practice, based upon orders in chancery, every demurrer is required to contain a statement of the causes thereof; and the defendant demurring must set down and express together with his demurrer, with reasonable certainty and directness, the causes of his demurrer, or it will be overruled.⁴ This rule of the English practice is adopted by the United States equity rules.⁵ The only general demurrer in equity is the one containing the usual formulary that there is no equity in the bill.⁶ Mr. Daniell says: "A demurrer will not be good if it merely says, generally, that the defendant demurs to the bill; it must express some cause of demurrer, either general or specific; a defendant is said to demur generally when he demurs to the jurisdiction, or to the substance of the bill; or specially, when he demurs on the ground of a defect in form. He may, however, in cases where he demurs either to the jurisdiction or to the substance, state specially the particular grounds upon which he founds his objection; and indeed some of the grounds of demurrer, which go to the substance of the bill, require rather a particular statement. Thus a demurrer for want of parties must, as has been stated, show

¹ *Hunt v. Rousmaniere*, 2 Mason, 342, Fed. Cas. No. 6,898; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, 90 Fed. R. 599.

² *Tyler v. Hand*, 7 How. 575.

³ *Tyler v. Hand*, 7 How. 575.

⁴ *Beames' Orders*, 77, 173; *Sanders' Orders*, 180, 223; *Duffield v. Groves*,

Cary, 125; *Offley v. Morgan*, *Cary*, 153; *Peachin v. Twycross*, *Cary*, 113; *2 Daniell*, 71; *Redesdale* (6th Am. ed.), 253; *Story's Eq. Pl.*, sec. 455; *Langdell's Eq. Pl.*, sec. 95.

⁵ *Equity Rule* 90.

⁶ *Story's Eq. Pl.*, sec. 455; *Langdell's Eq. Pl.*, sec. 95.

who are the necessary parties, in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding proper parties; and in the case of a demurrer for multifariousness, a mere allegation that the bill is multifarious will be informal; it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing. It is also to be observed that some objections, which appear to be merely upon matters of form, may be taken advantage of under general demurrers for want of equity. Thus it has been before stated that some bills may be demurred to on the ground that they are not accompanied by an affidavit; that objection, however, is in fact an objection to the equity, because the cases in which an affidavit is required are those in which the court has no jurisdiction, unless upon the supposition that the fact stated in the affidavit is true; and the court requires the annexation of the affidavit to the bill for the purpose of verifying that fact; and so in those cases in which a demurrer will lie because the plaintiff's right is not stated to have been first established at law, it is because the ground of the court's interference is the fact that the legal title of the defendant has been established in some proceeding in a court of ordinary jurisdiction. In all these cases the objection may be made either in the form of a special demurrer or of a general demurrer for want of equity; because the plaintiff, by his bill, does not bring his case within the description of cases over which the court exercises jurisdiction. Upon the same principle, a defendant may take advantage, by general demurrer, of the omission to offer to do equity in cases where such an offer ought to be made. The objection for want of sufficient positiveness in the plaintiff's statement of facts within his own knowledge may also be taken by general demurrer. It is to be observed that where a defendant to a bill praying relief demurs to the discovery only, he cannot do so under a general demurrer for want of equity; he must make it the subject of a special demurrer."¹

§ 204. **Demurrer ore tenus.**—A defendant is not limited to one cause of demurrer, but may assign as many causes as his

¹ 2 Daniell, 71, 72.

counsel may deem proper, either to the whole bill or to each part of the bill demurred to; and if any one of the causes assigned be held good by the court the demurrer will be allowed. And the defendant may on the argument, at the hearing, orally assign other causes of demurrer, different or in addition to those assigned upon the record, which if valid will support the demurrer, although the causes of demurrer stated upon the record be held to be invalid. This oral statement of causes of demurrer at the bar is called demurring *ore tenus*. But every cause of demurrer, whether assigned upon the record or *ore tenus* at the bar, must be co-extensive with the demurrer upon the record; and causes of demurrer which apply to part of the bill only cannot be joined with causes of demurrer which go to the whole bill; for a demurrer cannot be good in part and bad in part, which would be the case if a demurrer going to the whole bill could be supported by a ground of demurrer which applies to part of the bill only. But where the causes of demurrer assigned upon the record are overruled, and the demurrer is sustained upon grounds assigned orally at the hearing, the defendant is, according to the English practice, required to pay the costs of the demurrer upon the record, unless the court sees fit to make an order to the contrary.¹

§ 205. **Statement of the extent of the demurrer.**—The defendant may “demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue.”² And defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes; for the same grounds of demurrer frequently will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled upon the argument and another allowed.³ In framing a demurrer to a part only of a bill, or in framing two or more distinct demurrers to different portions of the bill, care must be taken to make the demurrer clearly and distinctly express and point out the particular parts of the bill which it

¹ 2 Daniell, 73, 74, 91, 92, 93; Brinkerhoff v. Brown, 6 Johns. Ch. 139; Robinson v. Smith, 3 Paige Ch. 222; Garlick v. Strong, 3 Paige Ch. 440.

² Equity Rule 32; Livingston v. Story, 9 Pet. 632.

³ Redesdale (6th Am. ed.), 253, 254; 2 Daniell, 68.

is designed to cover.¹ Whenever a plea or demurrer does not extend to the whole bill, or there is a demurrer as to one part and a plea to another part, or separate pleas to distinct parts of the bill, the plea or demurrer should clearly express what part of the bill it is intended to cover, or the particular parts to which each defense is intended to be applied.² Upon this rule of practice Chancellor Walworth, deciding upon a demurrer, said: "The defendant did not probably intend to cover so much of the discovery sought by the bill as is actually embraced in the second demurrer. But the rule of chancery pleading is such on this subject that if the demurrer does not go to the whole bill it must clearly express the particular parts which it is designed to cover, so that upon a reference of the answer to the residue of the bill, upon exception for insufficiency, the master may be able to ascertain precisely how far the demurrer goes, and how much of the bill remains to be answered."³

§ 206. A demurrer bad in part is bad in whole.—A demurrer is an entirety. It is a rule of courts that a demurrer cannot be good in part and bad in part; and if any part of the bill is good, and entitles the plaintiff either to relief or discovery, a demurrer to the whole bill cannot be sustained.⁴ In one of the cases cited, Justice Thompson, of the United States supreme court, said: "And if any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained. It is an established and universal rule of pleading in chancery that a defendant may meet a complainant's bill by several modes of defense. He may demur, answer and plead to different parts of a bill. So that, if a bill for discovery and relief contains proper matter for the one and not for the other, the defendant should an-

¹ 2 Daniell, 69, 70; *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640; *Railroad Co. v. McComb*, 2 Fed. R. 20; *Van Hook v. Whitlock*, 3 Paige Ch. 409, 418; *Jarvis v. Palmer*, 11 Paige Ch. 650.

² *Van Hook v. Whitlock*, 3 Paige Ch. 409, 418.

³ *Jarvis v. Palmer*, 11 Paige Ch. 650.

⁴ *Livingston v. Story*, 9 Pet. 632; *Stewart v. Masterson*, 131 U. S. 151, 159; *Leroy v. Veeder*, 1 Johns. Cas. 423; *Laight v. Morgan*, 1 Johns. Cas. 429; *Kimberly v. Sells*, 3 Johns. Ch. 467; *Higinbotham v. Burnet*, 5 Johns. Ch. 184; *Verplank v. Caines*, 1 Johns. Ch. 57; 2 Daniell, 67.

swer the proper, and demur to the improper, matter. But if he demurs to the whole bill, the demurrer must be overruled.”¹ Where there is a single demurrer, it must be wholly sustained or overruled.² When there is a demurrer to the whole bill, and also to a part, and the latter only is sustained, the regular decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged bad, and to overrule the demurrer to the residue, and direct the defendant to answer thereto.³

§ 207, **Demurrer and answer to same matter.**—A demurrer is, in legal effect, an allegation or protest that the defendant is not bound to answer the bill, and it demands the judgment of the court whether the defendant shall make answer to the bill, or to that part of it to which the demurrer extends; and it would be inconsistent to permit the defendant to answer the bill until the demurrer has been disposed of by the judgment of the court. In the English practice it has therefore been adopted as an invariable rule that an answer or plea to any part of a bill demurred to will overrule the demurrer, even though the part answered be immaterial.⁴ The defendant may plead, answer and demur to the same bill; but each of these defenses must refer to, and profess, in terms, to be put in as a defense to, separate and distinct parts of the bill. If an answer commences as an answer to the whole bill, it will overrule a plea or demurrer to any particular part of the bill, although the defendant does not in fact answer that part of the bill which is covered by the plea or demurrer.⁵ It is a settled rule in pleading that a defendant cannot plead or answer and demur to the same matter; the former will overrule the latter. It is inconsistent for a defendant to say he ought not to answer to a bill and yet to answer it fully.⁶

A United States equity rule provides that: “No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or

¹ *Livingston v. Story*, 9 Pet. 632.

² *Marshall v. City of Vicksburg*, 15 Wall. 146.

³ *Giant Powder Co. v. Cal. Powder Co.*, 98 U. S. 126, 140.

⁴ *Daniell*, 75.

⁵ *Leacraft v. Dempsey*, 4 Paige Ch. 125.

⁶ *Clark v. Phelps*, 6 Johns. Ch. 214.

plea.”¹ This rule was adopted to save the defendant from having his demurrer overruled because by inadvertence he answers some immaterial part of the bill covered by the demurrer; and the new rule does not permit the defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time.² Pardee, Circuit Judge, construing this rule, said: “We notice that with the demurrer to the whole bill and four separate pleas, each going to the whole bill, there is also filed an answer to the whole bill, in which the matters averred in the pleas are again set forth. Under the thirty-second equity rule, a defendant may demur to part of a bill, plead to part, and answer as to the residue. Under the thirty-seventh equity rule no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea. But we do not understand that there is any rule that allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time. The effect of such pleading is that the plea is taken as waiving the demurrer, and the answer as waiving the plea.”³ In another case the same learned judge said: “That rule (equity rule 37) only applies in cases where the demurrer or plea extends to only a part of the bill, and the answer is intended to cover the residue. Under the practice as it existed previous to the adoption of this rule, if the plea was to a part only, and the answer to the remainder, and such answer, by inadvertence or otherwise, referred to the matters covered by the plea, the effect was to overrule the latter. The thirty-seventh rule was evidently intended to change that practice, as a careful examination of its provisions will show.”⁴

§ 208. Demurrer too restricted.—It was also a rule of the English chancery practice that if the defendant demurred to a part of the bill and answered to a part, and the demurrer did not cover as much of the bill as in law it might have covered,

¹ Equity Rule 37.

865; *Hudson v. Randolph*, 66 Fed. R. 216.

² *Crescent City & C. Co. v. Butchers' Union & C. Co.*, 12 Fed. R. 225; *Huntington v. Laidley*, 79 Fed. R.

³ 12 Fed. R. 226.
⁴ 79 Fed. R. 867.

an answer to such part not so covered by the demurrer overruled the demurrer.¹ And, to correct the inconvenience arising from this rule, a United States equity rule provides that: "No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might in law have extended to."²

§ 209. Admissions made by the demurrer.—A demurrer proceeds upon the ground that, admitting the case made by the bill to be true, the plaintiff is not entitled to the relief he seeks; therefore the demurrer admits, for the sake of argument only, that all the facts well pleaded in the bill are true in manner and form as therein alleged, and no fact alleged in the bill can be denied upon the argument of the demurrer. But a demurrer does not admit matters of law suggested or averred in the bill; nor does a demurrer admit facts which are repugnant to each other; nor does a demurrer admit the averment of any fact in the bill which is repugnant to any fact of which the court will take judicial knowledge.³ A demurrer does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill.⁴ A fact impossible in law cannot be admitted by demurrer.⁵ Averments charging fraud and conspiracy, without stating the specific acts which constitute the fraud and conspiracy, are mere allegations of conclusions of law, and are not admitted by demurrer.⁶ A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one, nor that the statute imposes the obligation or confers the rights which the pleading alleges.⁷

§ 210. Speaking demurrers.—A demurrer cannot introduce as its support new facts which do not appear on the face of the bill and which must be set up by plea or answer. Such a demurrer is called a speaking demurrer and will be over-

¹ 2 Daniell, 75, 76.

² Equity Rule 36.

³ 2 Daniell, 20, 24; Mosher v. St. Louis, I. M. & S. R. Co., 127 U. S. 390; Chicot County v. Sherwood, 148 U. S. 529.

⁴ Dillon v. Barnard, 21 Wall. 430;

Interstate Land Co. v. Maxwell Land Co., 139 U. S. 569.

⁵ Louisville & Nashville R. Co. v. Palmes, 109 U. S. 224-258.

⁶ Ambler v. Choteau, 107 U. S. 586, 591; Fogg v. Blair, 139 U. S. 118, 127.

⁷ Pennie v. Reis, 132 U. S. 464.

ruled.¹ A demurrer which is attempted to be sustained by an averment of a fact in an answer is in the nature of a speaking demurrer and is not aided by such averment.² "In order to constitute a speaking demurrer the fact or averment introduced must be one which is necessary to support the demurrer and is not found in the bill; the introduction of immaterial facts, or averments, or arguments is improper, but it is mere surplusage and will not vitiate the demurrer."³

§ 211. **Form of demurrer.**—The formal requisites of a demurrer are: (1) The title. A demurrer should begin by stating the court in which the suit is pending, and the number and style of the cause, and proceed substantially thus: "The demurrer of A. B. (or A. B. and C. D.) to the bill of complaint of E. F." If it be accompanied by a plea, or by an answer, it should be called in the title the demurrer and plea, or demurrer and answer. Where it is to an amended bill it need not be expressed in the title to be a demurrer to the original and amended bill; but if it be expressed as a demurrer to the amended bill that will be sufficient. (2) The protestation. After the title usually follows the protestation: "This defendant, by protestation, not confessing all or any of the matters and things in the said plaintiff's bill contained to be true in such manner and form as the same are therein set forth and alleged;" a practice borrowed from the common law, and probably intended to avoid conclusion in another suit, or in the suit in which it is put in, in case the demurrer should be overruled. (3) The statement of its extent. After the protestation follows a statement of the extent of the demurrer, whether to the whole bill or to a part; and, if to a part, it points out the parts of the bill to which it is intended to apply. (4) The statement of the causes. Then follows a statement of the causes of the demurrer, which should always be stated with as much particularity as the nature of the case will reasonably admit. (5) The demand for the judgment of the court. Immediately following the assignment of the causes of demurrer the defendant demands the judgment of the court

¹ *Stewart v. Masterson*, 131 U. S. 151, 159; *Brooks v. Gibson*, 4 Paige Ch. 374; 2 *Daniell*, 72.

² *Kuypers v. Reformed Dutch Church*, 6 Paige Ch. 570.

³ 2 *Daniell*, 72, 73.

whether he ought to be compelled to put in any answer to the bill, or, if the demurrer is to only a part of the bill, whether he ought to be compelled to put in an answer to that part covered by the demurrer; and the demand for judgment concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained. (6) The demurrer must be signed by counsel.¹

§ 212. Certificate of counsel and affidavit of defendant.—A United States equity rule provides that: "No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of defendant that it is not interposed for delay; and, if a plea, that it is true in point of fact."² If a demurrer is not certified by counsel, and supported by the affidavit of the defendant, it is fatally defective; and the plaintiff may disregard it and enter a decree *pro confesso*.³

§ 213. Filing, setting down and hearing demurrers.—After a demurrer has been prepared it must then be filed in the clerk's office⁴ and entered upon the order book, and such entry is sufficient notice to the plaintiff that the demurrer has been filed.⁵ An equity rule provides that: "If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day, when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course unless a judge of the court shall allow him further time for that purpose."⁶ A demurrer is set down for argument by the plaintiff by entering an order as of course upon the order book to that effect.⁷ The defendant may set down the demurrer for argument,⁸ or if the plaintiff fail to set it down within the time limited by the rules, the defendant may enter upon the order book an order as of course dismissing the plaintiff's bill.

¹ 2 Daniell, 68-78; Story's Eq. Pl., sec. 455, notes 1, 2.

² Equity Rule 31.

³ Sheffield Furnace Co. v. With-
erow, 143 U. S. 574, 580; American
Steel & Wire Co. v. Wire Drawers'

& Die Makers' Unions, 90 Fed. R. 598;
Preston v. Finley, 72 Fed. R. 850.

⁴ Equity Rules 1, 18; 2 Daniell, 78.

⁵ Equity Rules 4, 5.

⁶ Equity Rule 38.

⁷ Equity Rules 4, 5, 33, 38.

⁸ 2 Daniell, 85.

iff's bill;¹ but such a dismissal will not bar another suit.² The demurrer may be heard and argued at chambers in vacation or on a rule-day, as well as in term.³ "The usual course of proceeding when the demurrer comes on for hearing, and all parties appear, is, generally, for the junior counsel for the party setting the demurrer down for argument to open the pleadings, after which the counsel in support of the demurrer are heard, and next the plaintiff's counsel, and then the leading counsel for the demurring party replies. In hearing a demurrer the argument is strictly confined to the case appearing upon the record, and for the purposes of the argument the matters of fact stated in the bill are admitted to be true."⁴

§ 214. Effect of allowing a demurrer.—The effect of allowing a demurrer in the English practice is stated by Lord Redesdale as follows: "But after a demurrer to the whole bill has been argued and allowed, the bill is out of court, and therefore cannot be regularly amended. To avoid this consequence the court has sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill; and this has frequently been done in the case of a demurrer for want of parties. Where a demurrer leaves any part of the bill untouched, the whole may be amended, notwithstanding the allowance of the demurrer; for the suit in that case continues in court, the want of which circumstance seems to be the reason of the contrary practice where a demurrer to the whole of the bill has been allowed. A demurrer being frequently on matter of form is not in general a bar to a new bill; but if the court upon a demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit."⁵ But the English rule, by which the allowance of a demurrer to the whole bill puts the bill out of court, has been changed by a United States equity rule, which provides that "if, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to

¹ Equity Rule 38.

² *Walden v. Bodley*, 14 Pet. 156.

³ Equity Rules 1, 3, 4, 6.

⁴ 2 Daniell, 86.

⁵ *Redesdale* (6th Am. ed.), 254; and see also 2 Daniell, 88, 91.

amend his bill, upon such terms as it shall deem reasonable.”¹ In passing upon the effect of the allowance of a demurrer to a complaint in an equitable action, the supreme court of the United States said: “A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action.”² But if a bill in equity be dismissed for defect of pleading, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or on any ground which does not go to the merits of the action, the decree of dismissal cannot be pleaded as a bar to another suit for the same cause of action.³

§ 215. Effect of overruling a demurrer.—After a demurrer to the whole bill has been overruled, the defendant, unless he obtains leave to put in a demurrer of a less extended nature, or a plea either to the whole bill or to some part of it, must put in a full answer.⁴ A United States equity rule provides that: “If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the

¹ Equity Rule 35; U. S. R. S., sec. 954; *Hunt v. Rousmaniere*, 2 Mason, 342, Fed. Cas. No. 6,898; *National Bank v. Carpenter*, 101 U. S. 567; *Dowell v. Applegate*, 8 Fed. R. 698.

² *Alley v. Nott*, 111 U. S. 472, 477.

³ *Hughes v. United States*, 4 Wall. 232, 237; *Walden v. Bodley*, 14 Pet. 156.

⁴ 2 *Daniell*, 94, 95.

court, be reasonably done; in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.”¹

§ 216. No demurrers in equity to answers and pleas.—The only pleading in equity that can be demurred to is the bill. There is no such thing as a demurrer to an answer in equity. The only way by which the sufficiency of the answer on its merits as a defense can be tested is by setting the case down for hearing on bill and answer.² The only method by which the plaintiff may test the legal sufficiency of a plea in equity is to set down the plea for argument.³

¹ Equity Rule 34.

² Langdell's Eq. Pl., sec. 94; Banks v. Manchester, 128 U. S. 244; Walker v. Jack, 88 Fed. R. 576; Grether v. Cornell's Ex'rs, 75 Fed. R. 742; Crouch v. Kerr, 38 Fed. R. 549; Travers v.

Ross, 14 N. J. Eq. 254; Winters v. Claitor, 54 Miss. 341.

³ Equity Rules 33, 34; Hatch v. Bancroft-Thompson Co., 67 Fed. R. 802; 2 Daniell, 216-223.

CHAPTER XII.

PLEAS.

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| <p>§ 217. Pleas in equity derived from the common law.</p> <p>218. The general nature and classification of pleas at common law.</p> <p>219. Pleas in bar at common law.</p> <p>220. Singleness or unity of issue at common law.</p> <p>221. General classification of pleas in equity.</p> <p>222. The proper office of a plea in equity.</p> <p>223. Same—Singleness and materiality of issue.</p> <p>224. Pleading several pleas to different parts of the same bill.</p> <p>225. Several pleas by leave of court.</p> <p>226. What constitutes duplicity in a plea in equity.</p> <p>227. Frame of plea determined by form of bill.</p> <p>228. Pleas classified according to their form.</p> <p>229. The necessary averments of a plea.</p> <p>230. Statement of the extent of the plea.</p> <p>231. Plea bad in part and good in part.</p> <p>232. Answer in support of a plea.</p> <p>233. Same—When required.</p> <p>234. Same—Equity rule.</p> <p>235. Same—Discovery of documents.</p> <p>236. Test of the sufficiency of answer in support of plea.</p> <p>237. Answer in support of plea evidence for defendant.</p> <p>238. Answer <i>in subsidium</i> of a plea.</p> <p>239. Jurisdictional objection in equity should be taken by special plea.</p> | <p>§ 240. Definition of pleas to the jurisdiction.</p> <p>241. Classification of pleas to the jurisdiction.</p> <p>242. Plea that the subject-matter of the suit is not within the jurisdiction of a court of equity.</p> <p>243. Plea of personal privilege.</p> <p>244. Plea denying that jurisdictional amount is in dispute.</p> <p>245. Plea denying diversity of citizenship.</p> <p>246. Plea to jurisdiction in suits by consignees.</p> <p>247. When jurisdictional objection may be raised under the act of 1875.</p> <p>248. Reason and policy of the statute.</p> <p>249. Procedure under the act of 1875.</p> <p>250. Same—Formal plea to the jurisdiction the simplest method.</p> <p>251. Discretion of the court is judicial and subject to review.</p> <p>252. Burden of proof upon the issue of jurisdiction.</p> <p>253. Presumptions in favor of the jurisdiction of courts.</p> <p>254. Pleas in abatement—Definition.</p> <p>255. Classification of pleas in abatement.</p> <p>256. Classification of pleas to the person of the plaintiff.</p> <p>257. Classification of pleas to the person of the defendant.</p> <p>258. Classification of pleas to the bill.</p> |
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| <p>§ 259. Plea that plaintiff does not possess the character in which he sues.</p> <p>260. Plea that defendant does not sustain the character in which he is sued.</p> <p>261. Plea of bankruptcy.</p> <p>262. Plea of another suit pending.</p> <p>263. Reason for the rule that suit pending is pleadable in abatement of a second suit.</p> <p>264. Requisites of a plea of <i>lis pendens</i>.</p> <p>265. Procedure when plaintiff sues both at law and in equity.</p> <p>266. Plea of want of parties.</p> <p>267. Pleas in bar — Definition.</p> <p>268. General classification of pleas in bar.</p> <p>269. Classification of pleas of statutes.</p> <p>270. Classification of pleas of matter of record.</p> <p>271. Classification of pleas of matter in pais.</p> <p>272. Classification of negative pleas.</p> <p>273. Plea of the statute of limitations.</p> <p>274. Necessary averments of a plea of the statute of limitations.</p> <p>275. Plea of laches.</p> <p>276. Plea of the statute of frauds.</p> <p>277. Plea of any other statute.</p> <p>278. Plea of a decree in equity.</p> <p>279. The extent of a plea of <i>res judicata</i>.</p> | <p>§ 280. Requisites of a plea of <i>res judicata</i>.</p> <p>281. Plea of a release.</p> <p>282. Plea of a stated account.</p> <p>283. Plea of an account settled.</p> <p>284. Plea of an award.</p> <p>285. Plea of <i>bona fide</i> purchaser.</p> <p>286. Same — Notice.</p> <p>287. Plea of paramount title.</p> <p>288. Pleas to bills for discovery.</p> <p>289. Pleas to bills not original.</p> <p>290. The form and frame of a plea.</p> <p>291. Plea must be supported by certificate of counsel and affidavit of defendant.</p> <p>292. Filing the plea.</p> <p>293. Proceedings to be taken by plaintiff upon a plea filed.</p> <p>294. The argument of a plea.</p> <p>295. Allowing pleas.</p> <p>296. Saving the benefit of a plea to the hearing.</p> <p>297. Ordering a plea to stand for an answer.</p> <p>298. Overruling pleas.</p> <p>299. Proceedings upon a plea of matter of record.</p> <p>300. The effect of joining issue upon and establishing plea by proof — The English rule abolished.</p> <p>301. The effect of falsifying a plea in bar.</p> <p>302. The effect of proving dilatory pleas.</p> <p>303. Plea allowed by prematurely excepting to answer.</p> <p>304. Amending pleas.</p> |
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§ 217. Pleas in equity derived from the common law.—Pleas in equity, like demurrers, were derived from the common-law system of pleading, and, by the process of assimilation, became a part of the system of equity pleading; and in adapting and incorporating pleas in its system of remedies, and in defining their office and functions, and deciding upon questions of practice in relation to them, the English High Court of Chancery followed, to a great extent, the rules applicable to pleas at common law. The adoption of the plea

naturally carried with it many of the rules of the system from which it was taken. Many of England's greatest chancellors were men eminent for their learning in the common law and its system of pleading and remedies; and, from education and practice, were attached to its rules of pleading and procedure, and there must have been a strong inclination to follow them in chancery, where the peculiar constitution of that court permitted it; and it is said that they "endeavored to decide upon questions of pleading with analogy to the law;" and that they "in deciding upon pleas in equity followed the strict rule at law;" and "in pleading, there must, in general, be the same strictness in equity as at law, at least in matters of substance;" and that "the general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion." And it seems that the analogy between pleas at law and in equity was made as complete as could be, consistently with the difference between the constitution of the two courts, and their mode of procedure, and the remedies administered by them, respectively.¹ The very names, grounds, office and classification of pleas at law, and the due order of pleading them, are adopted and followed in equity; and on account of this analogy it is convenient, if not necessary, in a work on equity procedure, to state the general nature of pleas at common law, and some of the principal rules governing them; and this we will endeavor to do, as introductory to the treatment of pleas in equity.

§ 218. The general nature and classification of pleas at common law.—At common law pleas were: (1) pleas to the jurisdiction of the court; (2) pleas in abatement of the suit; (3) pleas in bar of the action. All pleas fall within some one of these classes. A more particular classification of pleas, and the due order of pleading them, is as follows: First. Pleas to the jurisdiction of the court. Second. Pleas in abatement of the suit: 1. To the person (1) of the plaintiff, and (2) of the defendant. 2. To the count. 3. To the writ, and (1) to the form, and (2) to the action of the writ. Third. Pleas to the action itself in bar thereof. All of these pleas could be resorted to successively in the same action, if pleaded in the

¹Beames' Pl. in Eq., V to IX, 56, 62.

order named. A plea to the jurisdiction is one which denies that the court has jurisdiction to hear and determine the cause. Pleas in abatement admit the jurisdiction of the court, but allege that the plaintiff has not the capacity to sue, or that the defendant is not liable to be sued, or that there is some irregularity or informality in the proceeding, and that, therefore, the suit should be abated. A plea to the merits waives the objection to the jurisdiction and in abatement.¹

§ 219. Pleas in bar at common law.—Pleas in bar go to the merits of the case and deny that the plaintiff has any cause of action; they allege either that the plaintiff never had any cause of action or, if he had, that it is discharged by some subsequent matter. Considered with reference to the declaration, pleas in bar are either: (1) In denial of the material allegations of the declaration, which is called a plea by way of traverse; or (2) in confession and avoidance of the cause of action, which is called a plea by way of confession and avoidance, and which always admits the facts averred in the declaration, but avoids them by averment of new matter; or (3) they conclude the plaintiff by matter of estoppel, and it neither admits nor denies the facts averred in the declaration, but alleges some matter of estoppel, as a record, or deed, or matter of fact, to which the plaintiff is a party or privy, and which, being inconsistent with his allegations, precludes him from availing himself of them. An estoppel precludes a party, in consequence of his own previous act, allegation or denial to the contrary, from alleging the truth.²

§ 220. Singleness or unity of issue at common law.—Pleadings at common law aimed at the production of a single, certain, material issue of fact upon the same subject-matter of dispute, the decision of which would be conclusive of the whole question. This rule was directed against what is called duplicity, or doubleness in pleading, and applies both to the declaration and subsequent pleadings.³ By the common-law rule the

¹ Tidd's Prac. 572-589; 1 Chitty's ch. 2, secs. 38-42; Stephen's PL. PL. (9th Am. ed.) 440-463; Gould's (Heard), 51, 195-197.

PL., ch. 2, secs. 31-37, and ch. 5, secs. 1-13; Stephen's PL. (Heard), 430, 431. ³ Gould's PL., ch. 8, secs. 1-9; Stephen's PL. (Heard), 251-262; Chitty's PL. (9th Am. ed.) 226, 228.

² Tidd's Prac. 590; 1 Chitty's PL. (9th Am. ed.) 469-511; Gould's PL.,

plaintiff cannot, in support of a single demand, allege two or more distinct grounds or matters, each of which, independently of the others, amounts to a good cause of action in respect of such demand; but the declaration may, in support of several demands, allege as many distinct matters as are respectively applicable to each, the object of the rule being to enforce a single subject of claim. And the declaration might contain several counts upon either the same cause of action, or upon distinct causes of action of a like nature.¹ The rule against duplicity precluded the defendant from stating in his plea more than one matter constituting a sufficient defense to the same claim; but several distinct facts or allegations, however numerous, might be comprised in the same plea without amounting to the fault of duplicity, if one fact, or some of the facts, be but dependent upon, or be mere inducement or introduction to, the others, or if the different facts form together but one connected proposition or entire point.² At common law the defendant could plead only one plea to the whole declaration, but he might plead separate and distinct pleas to separate and distinct parts of the declaration; and where there were several defendants, each of them might plead a single matter to the whole, or several matters to different parts of the declaration.³ But where the defendants were sued as joint obligors, they were required to plead jointly and could not sever in pleading their defense.⁴ The common-law rule which allowed a defendant to plead only one plea to the whole declaration was at length relaxed by an act of parliament, which provides that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense.⁵ This statute allows the defendant, with leave of the court, to plead as many different pleas in bar to the whole or any part of the declaration as he may think proper; but it does not authorize him to allege

¹ 1 Chitty's Pl. (9th Am. ed.) 408-412.

ty's Pl. (9th Am. ed.) 560; Stephen's

² 1 Chitty's Pl. (9th Am. ed.) 226,

Pl. (Heard), 255-258, 269, 270.

227; Stephen's Pl. (Heard), 258-262;

⁴ Gould's Pl., ch. 8, sec. 7.

Gould's Pl., ch. 8, secs. 3, 4, 9.

⁵ Stat. 4 Anne, ch. 16, § 4; Gould's

³ 1 Tidd's Prac. 607; Gould's Pl., ch. 6, sec. 102, ch. 8, secs. 5, 6; 1 Chit-

Pl., ch. 8, secs. 18, 19; Stephen's Pl., (Heard), 270, 271; 1 Chitty's Pl. (9th Am. ed.) 259, 260.

more than one ground of defense in one plea; each plea must still be single, as by the rule of the common law.¹ As will be shown in subsequent sections, the common-law rule against duplicity is fully adopted in equity in so far as it applies to pleas.

§ 221. General classification of pleas in equity.—Pleas in equity are of three kinds, namely: (1) Pleas to the jurisdiction of the court. (2) Pleas in abatement of the suit. (3) Pleas in bar of the bill. In the classification of pleas in equity there has been some confusion in regard to terms,² but, when considered with reference to their office and purposes, all pleas must fall within one of these three classes; and this classification fully accords with that of the common law, from which pleas in equity are derived.³ This classification also corresponds with the classification of exceptions in the civil law, namely: (1) Declinatory exceptions, corresponding to common-law pleas to the jurisdiction; (2) dilatory exceptions, corresponding to common-law pleas in abatement; (3) peremptory exceptions, corresponding to common-law pleas in bar.⁴ A discussion of these different classes of pleas will be found in a subsequent part of this chapter.

§ 222. The proper office of a plea in equity.—The proper office of a plea in equity is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to that part to which the plea applies, and thus to avoid the necessity of making the discovery asked for and the expense of going into the evidence at large.⁵ It is a general rule that a plea ought not to contain more defenses than one. Various facts, therefore, can never be pleaded in one plea unless they

¹ Gould's Pl., ch. 8, sec. 19; Stephen's Pl. (Heard), 276.

² Beames' Pleas in Equity, 54-64.

³ 1 Tidd's Prac. 572-589; 1 Chitty's Pl. (9th Am. ed.) 440-463; Gould's Pl., ch. 2, secs. 31-37, and ch. 5, secs. 1-13; Stephen's Pl. (Heard), 430, 431.

⁴ Story's Eq. Pl., sec. 707; Beames' Pleas in Equity, 57-60.

⁵ Farley v. Kittson, 120 U. S. 303;

United States v. California & Oregon Land Co., 148 U. S. 31, 49; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; United States v. American Bell Tel. Co., 30 Fed. R. 523, 524; McCloskey v. Barr, 38 Fed. R. 165; Redesdale (6th Am. ed.), 257, 258; Hostetter Co. v. E. G. Lyons Co., 99 Fed. R. 734.

are all conducive to a single point on which the defendant means to rest his defense. This principle is so well established that it is unnecessary to refer to the many adjudicated cases to support it. It is fully stated by Lord Hardwicke in the following words: The defense proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and is to save the parties expense in examination; and it is not every good defense in equity that is likewise good as a plea; for where the defense consists of a variety of circumstances there is no use of a plea; the examination must still be at large, and the effect of allowing such a plea will be that the court will give their judgment on the circumstances of the case before they are made out by the proof.¹ The proper defense for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit or to the part of it to which the plea applies. It is not, however, necessary that it should consist of a single fact; for though a defense offered by way of plea consists of a great variety of circumstances, yet, if they all tend to one point, the plea will be good.² A plea may consist of a variety of facts and circumstances. All that is required is that those facts and circumstances should give as the result one clear ground upon which the whole equity of the bill may be disposed of.³ Every plea must rest the defense upon a single point, and upon that point create a bar to the suit. Such is the policy and convenience of pleading, and the party must resort to his answer if he wishes to avail himself of distinct matters. It is fit and salutary that a plea which mixes together different and discordant matters should be condemned; for it uselessly incumbers the record and performs no other purpose than to produce confusion.⁴ The criterion by which to determine how far a defense is proper by way of plea is to ascertain whether the cause is thereby reduced to a single point creating a complete bar to the suit. It is true the matter of a plea may consist of a variety of facts and circumstances, provided they are not inconsistent with each other and all tend to one point, making out one connected proposition

¹ Rhode Island v. Massachusetts, 14 Pet. 210.

² 2 Daniell, 97.

³ Hazard v. Durant, 25 Fed. R. 26; Didier v. Davison, 2 Sandf. Ch. 61.

⁴ Goodrich v. Pendleton, 3 Johns. Ch. 384.

sufficient of itself to form a defense to the bill, and not showing separate and distinct defenses, one of which would have been sufficient; for then the plea would be bad for duplicity.¹ A plea must reduce the cause to a single point constituting a ground why the suit should be dismissed, delayed or barred.²

§ 223. Same — Singleness and materiality of issue.— The result of all the authorities is, that a plea in equity, to be good, must tender a single, certain, material issue of fact, which, if established by the proof, shall be effectual in law and in equity to dismiss, delay or bar the bill, or that part of it to which the plea applies; and the statements of the plea should be certain, direct and positive, and should reduce the case, or some distinct and independent part of it, to one issuable and material point; and the plea must raise a material issue of fact. And when a plea contains more defenses than one; or when it puts in issue more than one point; or denies more than one independent, substantive part of the bill; or contains matter suitable for a plea and a demurrer, it is bad for duplicity and multifariousness. The objection of duplicity is much stronger where two inconsistent defenses are pleaded in the same plea. In these respects a plea in equity follows the rule which prevails at common law, requiring the plea to be certain, direct and positive, presenting a single material issue of fact, and answering every essential part of the declaration which it professes to answer, and alleging material facts within itself, upon which the plaintiff may, if he so elects, take issue; and in a plea in equity there must be the same strictness and exactness in substance as in pleas at common law; and a plea in equity should state clearly all the facts necessary to render it a complete bar to the case made by the bill, or that part of it to which the plea applies.³

¹ Loud v. Sergeant, 1 Edw. Ch. 164.

² Beames' Pleas in Equity, 10.

³ Rhode Island v. Massachusetts, 14 Pet. 210; Farley v. Kittson, 120 U. S. 303; United States v. California & Oregon Land Co., 148 U. S. 31, 49; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; United States v. American Bell Tel. Co., 30 Fed. R. 523, 524; McCloskey v. Barr, 38 Fed.

R. 165; Hazard v. Durant, 25 Fed. R. 36; Newby v. Oregon Cent. Ry. Co., 1 Sawyer, 63, Fed. Cas. No. 10,145; Gaines v. Mausseaux, 1 Woods, 118, Fed. Cas. No. 5,176; Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. R. 509; Goodrich v. Pendleton, 3 Johns. Ch. 384; Loud v. Sergeant, 1 Edw. Ch. 164; Saltus v. Tobias, 7 Johns. Ch. 214; Whitebread v. Brock-

§ 224. **Pleading several pleas to different parts of the same bill.**—As we have seen, at common law the defendant could plead one plea, and one only, to the whole declaration, or he could plead several separate pleas to different parts of the declaration; this was allowed by the rules of common-law pleading, and independently of any statute or leave of court.¹ The same rule obtains in respect to pleas in equity; the defendant may, without previous leave of court, plead one plea to the whole bill, or he may plead several separate pleas to different parts of the same bill, without violating the rule against duplicity and multifariousness.² And a defendant may demur to a part of the bill, plead to a part, and answer as to the residue.³ But where the defendant files several separate pleas to different parts of the bill, he should point out distinctly the different parts of the bill which are intended to be covered by the several separate pleas, respectively; and the same rule applies where he demurs to a part of the bill, pleads to a part, and answers to the residue.⁴

§ 225. **Several pleas by leave of court.**—While it is the undoubted general rule that the defendant is not allowed to file more than one plea to the whole bill, yet the court may in its discretion, and by an order previously granted, permit two or more several pleas filed to the whole bill; leave will be given to file several pleas to the whole bill where extraordinary inconvenience to the defendant might arise if several pleas were not allowed, and that mode of defense will best promote the ends of justice. In a suit to restrain the infringement of a patent, and requiring defendant to set forth accounts of extraordinary length, at great expense, and at the risk of making an inconvenient exposure of his affairs, leave was given him to plead first that the alleged invention was not useful, and second that it was not new. A defendant has been allowed to plead to the same bill, first, that the plaintiff is not heir, as averred in his bill; and second, that his claim was barred by

hurst, 1 Bro. Ch. 404; Beames' Pleas in Equity, 1-28; 2 Daniell, 102-104; Redesdale (6th Am. ed.), 257, 258; Story's Eq. Pl., secs. 652-666; Hostetter Co. v. E. G. Lyons Co., 99 Fed. R. 734.

¹ Tidd's Prac. 607.

² 2 Daniell, 105, 106.

³ 2 Daniell, 106; Equity Rule 32; Livingston v. Story, 9 Pet. 632.

⁴ 2 Daniell, 106.

the statute of limitations. Before defendant puts in more than one plea to the whole bill he must obtain an order for leave to do so, by special motion upon notice, and each defense must be set up by a separate plea, complete in itself.¹ Where a defendant in a suit in equity files several pleas to the whole bill without previous leave of court, he will be put to his election as to which plea he will stand upon.² Although a court of equity has the power to allow a defendant to plead two or more pleas in bar, it is not a matter of course to allow it to be done upon an affidavit merely showing that the defendant believes he has several defenses, of which he might avail himself by plea if permitted to do so. The general rule is that where a defendant in a court of equity wishes to set up more than one defense to the plaintiff's bill he must do it by answer. And he must make out a very special case of hardship and inconvenience to justify the court in departing from the general rule. The cases which would appear to justify a departure from the usual course of proceeding are where the making of the defense by answer, instead of by pleas, would render it necessary for the defendant to set out very long accounts in his answer, or where the discovery of matters sought for by the bill might be productive of great injury to defendant, in his business or otherwise, if he were required to put in a full answer.³

§ 226. What constitutes duplicity in a plea in equity.—It is the pleading of a double bar which constitutes duplicity in a plea. Where a bill in equity alleges matters and equitable circumstances for the purpose of anticipating and defeating a bar which might be set up by the plea, then, in such case, the plea, to be good, must by its averments set up, first, the bar to the bill, and second it must deny the special matter set up in the bill to defeat the bar, so as to exclude intendments which

¹ *Gibson v. Whitehead*, 4 Madd. 241; *Kay v. Marshall*, 1 Keen. 190; *Didier v. Davison*, 10 Paige Ch. 515; *Noyes v. Willard*, 1 Woods, 187, Fed. Cas. No. 10,374; *Bampton v. Birchall*, 4 Beav. 558; *Hardman v. Ellames*, 5 Sim. 640; *Saltus v. Tobias*, 7 Johns. Ch. 214; 2 *Daniell*, 104, 105; *Langdell's Eq. Pl.*, sec. 98; *Newby v. Oregon Cent. Ry. Co.*, 1 Sawy. 63, Fed. Cas. No. 10,145; *Van Hook v. Whitlock*, 3 Paige Ch. 409.

² *Noyes v. Willard*, 1 Woods, 189, Fed. Cas. No. 10,374; *Saltus v. Tobias*, 7 Johns. Ch. 214.

³ *Didier v. Davison*, 10 Paige Ch. 515.

would be made against the pleader by his failure to deny the special matter of avoidance set up in the bill; and the plea is not rendered bad for duplicity by the insertion therein of averments which are necessary to exclude intendments arising from allegations in the bill intended to anticipate and defeat the bar.¹ In the case just cited, Chancellor Walworth said: "The first objection to the plea is that it is multifarious or double, and does not rest the defense upon a single point. I think this objection is untenable. It is the pleading of a double bar which constitutes duplicity in a plea. But a plea is not rendered double by the mere insertion of averments therein which are necessary to exclude conclusions arising from allegations in the bill intended to anticipate and defeat the bar which might be set up in the plea. The object of the pleader in the present case appears to have been to rest his defense upon the point that the corporation entered into possession of the premises as early as 1705, under a grant from the crown, purporting to convey the whole property in fee, claiming title to the whole; and that it had continued in the exclusive and uninterrupted possession under such adverse claim from that time down to the present, a period of one hundred and twenty-five years before the commencement of the suit. But as the complainant had stated a variety of matters in the bill, which, if admitted to be true, would be evidence to counterprove the allegation of an adverse entry under claim of title, and of an adverse holding, it became necessary to negative those matters by general averments in the plea, and to support the plea by an answer as to those matters. . . . I have arrived at the conclusion that the plea of the defendant is good in point of form, and that the defense set up is sufficient in law to bar the suit of the complainant against the corporation."² Where the facts as stated in the plea are sufficient to constitute a good plea, introduction into the plea of a fact which, although it puts in issue a distinct matter, is not important to the validity of the plea itself, will not vitiate the plea.³

§ 227. Frame of plea determined by frame of bill.—Inasmuch as a plea in equity must clearly and distinctly aver all

¹ 2 Daniell, 108, 109; Beames' Pleas in Equity, 27-34; Bogardus v. Trinity Church, 4 Paige Ch. 178, 204.

² Bogardus v. Trinity Church, 4 Paige Ch. 178, 204.

³ 2 Daniell, 105.

the facts which are necessary to render it a complete equitable defense to the case made by the bill, and that the plea must be perfect in itself, so that, if true in point of fact, there may be an end of the cause, it therefore follows as a logical necessity in pleading that the frame and structure of the plea must be determined by the frame and structure of the bill. The plea must be so framed as to meet and destroy the case made by the bill or that part of it to which the plea extends.¹ It is a fundamental principle of pleading, in both the civil law² and common-law³ systems, that every pleading must be framed with the view of meeting and destroying the previous pleading to which it is an answer. An analysis of the bill is a prerequisite to a preparation and draft of the plea. Pleadings at common law commenced with the declaration, which contained a short statement of the plaintiff's cause of action. To the declaration the defendant filed a plea, which, if it did not deny the declaration, confessed and avoided it. To the defendant's plea the plaintiff filed a replication, and either took issue upon the plea, or by his replication confessed and avoided the plea; and this mode of pleading might go on through the successive stages of rejoinder, surrejoinder, rebutter and surrebutter, until the parties reached an issue. This system of pleading, including special replications and rejoinders and the other successive pleadings used in courts of common law, was formerly used in courts of equity also. But under the modern system of equity pleading, the bill, special replication, and all the subsequent pleadings of the plaintiff in the former system, are now blended in the bill and constitute one pleading; the bill now contains what was formerly the bill, special replication, and other successive pleadings of the plaintiff.⁴ A bill now embraces the following elements, viz.: (1) A statement of the essential ultimate facts which constitute the plaintiff's case, and upon which he rests his claim for relief. (2) The plaintiff may state by way of pretense in his bill the facts which he anticipates the defendant will interpose as a defense to the suit; and (3) may

¹ Beames' Plea in Equity, 24; Allen v. Randolph, 4 Johns. Ch. 693; Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339; 2 Daniell, 107, 108, 109, 110; Langdell's Eq. Pl., sec. 101.

² Langdell's Eq. Pl., sec. 5.

³ 1 Tidd's Prac., 590-600.

⁴ Redesdale (6th Am. ed.), 19, 383; Wigram on Discovery, 40; 2 Daniell, 383.

deny, or explain, or confess and avoid such anticipated defense, by the averment of other facts. (4) The plaintiff may, in his bill, charge facts in proof of his own case, and (5) he may charge facts to counterprove the anticipated defense of the defendant, and (6) may charge any matter of evidence or collateral facts and circumstances, the admission of which by defendant may be material in proving the plaintiff's case or in destroying the defendant's defense, or in ascertaining or determining the nature and extent and kind of relief to which the plaintiff may be entitled, consistently with the case made by the bill, and (7) may charge that defendant has in his possession books and documents which are evidence to support the bill, and (8) may demand of defendant a discovery of all the matters alleged and charged in the bill.¹ This change in the frame and form of the bill in equity has produced a consequent change in the form of pleas in equity and the practice in relation to them, which must be kept steadily in view.²

But in order to constitute a good bill it is not necessary that it should contain anything but the address, the statement of the facts which constitute the plaintiff's case, and a prayer for relief and for process; and the plaintiff may, at his option, omit that part of the bill which anticipates and avoids the defense to be interposed by defendant, and may waive discovery;³ and the frame and structure of a plea to such a bill must be materially different from a plea to a bill that anticipates and avoids the defense of defendant.⁴

§ 228. Pleas classified according to their form.—Pleas in bar in equity, considered with reference to their form and frame, are of three kinds, viz.:

(1) Affirmative pleas, which allege some new matter not apparent upon the face of the bill, by which, admitting the bill, so far as it is not contradicted by the plea, to be true, the suit, or the part of it to which the plea extends, is barred. Such pleas usually proceed upon the ground that, admitting the case stated by the bill to be true, so far as it is not contradicted by

¹ *Ante*, §§ 106, 116, 118, and authorities cited.

² Redesdale (6th Am. ed.), 282-286; Story's Eq. Pl., secs. 676-678.

³ Equity Rule 21.

⁴ 2 Daniell, 99, 100.

the plea, the new matter stated in the plea displaces the equity of the bill, and effectually bars the plaintiff's right to the relief he prays or the discovery he seeks. Instances of this form of plea are: a plea of the statute of limitation; a plea of the statute of frauds; a plea of award; a plea of account stated; and a plea of *bona fide* purchaser for valuable consideration without notice.¹

(2) Negative pleas, in which some one main fact or allegation in the bill, and upon which plaintiff's right depends, is denied. Instances of negative pleas are: a plea denying that plaintiff is heir, where he sues as such; a plea denying that there is a mortgage, interposed to a bill praying that defendant might redeem a mortgage or be foreclosed; a plea denying plaintiff's title to a bill alleging a partnership and praying for an account; a plea denying the existence of the partnership.²

(3) Anomalous pleas. This plea "reasserts some fact stated in the bill, and which the bill seeks to impeach, and denies all the circumstances which the plaintiff relies upon as the ground upon which he seeks to impeach the fact so set up. Thus, where a bill is brought to impeach a decree on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud. Of the same nature are pleas setting up the award itself to a bill filed for the purpose of impeaching it on the ground of partiality or fraud in the arbitrators; or a stated account, where error or fraud in the account is charged by the bill for the purpose of avoiding its effect."³

The doctrine in relation to this class of pleas is stated by Lord Redesdale as follows: "If a bill is brought to impeach a decree upon the ground of fraud used in obtaining it, which, as has been observed, may be done without the previous leave of the court, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud, supported by an answer fully denying them. Whether averments negating the charges of fraud are necessary to a plea of this description appears to have been a question much agitated in recent cases;

¹ 2 Daniell, 98, 115; Adams' Eq. 336. *Rhino v. Emery*, 79 Fed. R. 483, and

² 2 Daniell, 98, 115; Adams' Eq. 337; authorities cited.

³ 2 Daniell, 99, 115; Adams' Eq. 338.

upon which it may be observed that, without such averments, if the decree were admitted by the bill, nothing would be put in issue by the plea. The question in the cause must be, not whether such a decree had been made, but whether, such a decree having been made, it ought to operate to bar the plaintiff's demand. To avoid its operation the bill must allege fraud in obtaining it; and to sustain it as a bar the fact of fraud must be denied and put in issue by the plea. For upon the question whether the decree ought to operate as a bar, the fact of fraud is the only point upon which issue can be joined between the parties; and unless the plea covers the fact of fraud, it does not meet the case made by the bill; and on argument of the plea the charge of fraud, not being denied by the plea, must be taken to be true. If the bill states the decree only as a pretense of the defendant, which it avoids by stating that, if any such decree had been made, it had been obtained by fraud, the decree must be pleaded, because the fact of the decree is not admitted by the bill; and the charge of fraud must also be denied by the plea for the reason before stated. If the bill states the decree absolutely, but charges fraud to impeach it, yet the decree must be pleaded, because the decree, if not avoidable, is alone the bar to the suit; and the fraud by which the bar is sought to be avoided must be met by negative averments in the plea, because without such averments the plea would admit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined on such a plea, if the decree is admitted by the bill, the only subject upon which evidence can be given is the fact of fraud. If that should be proved, it would open the decree on the hearing of the cause; and the defendant would then be put to answer generally, and to make defense to the bill as if no such decree had been made. The object of the plea is to prevent the necessity of entering into the defense by trying first the validity of the decree. If the evidence of fraud should fail, the decree operating as a bar would determine the suit as far as the operation of the decree would extend.

“It has also been objected that a plea of the decree is a plea of the matter impeached by the bill; but the frame of a bill in equity necessarily produces, in various instances, this mode of pleading. If the bill stated the title under which the plaintiff

claimed, without stating the decree by which it had been affected, the defendant might have pleaded the decree alone in bar. If the bill stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and yet sought relief founded on the title concluded by it, the defendant might demur; because upon the face of the bill the title of the plaintiff would appear so concluded. But as in the form of pleading in equity the bill may state the title of the plaintiff, and at the same time state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree by alleging that it had been obtained by fraud, if the defendant could not take the judgment of the court upon the conclusiveness of the decree by plea upon which the matter by which the decree was impeached would be alone in issue, he must enter into the same defense (by evidence as well as by answer) as if no decree had been made; and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is therefore permitted to him to avoid entering into the general question of the plaintiff's title as not affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defense, namely, the fact of fraud in obtaining the decree. This has been permitted to be done in the only way that it can be done, by pleading the decree with averments denying the fraud alleged; and those averments being the only matter in issue, they are necessarily of the very substance of the plea. The decree if obtained by fraud would be no bar; and nothing can be in issue on a plea but that which is contained in the plea; and every charge in a bill not negatived by the plea is taken to be true on argument of the plea. If, therefore, the decree merely were pleaded on argument of the plea, the charge of fraud must be taken to be true, and the plea therefore ought to be overruled; but if on argument the plea were allowed, or if the plaintiff, without arguing, replied to the plea, no evidence could be given on the charges of fraud to avoid the plea, and the defendant proving his plea, that is, proving the decree and nothing more, would be entitled to have the bill dismissed at the hearing.

“As the averments negativing the charges of fraud are used merely to put the fact of fraud, as alleged in the bill, in issue

on the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud contained in the bill fully in issue. And, as the plaintiff is entitled to have the answer of the defendant upon oath to any matter in dispute between them, in aid of proof of the case made by the bill, the defendant must answer to the facts of fraud alleged in the bill so fully as to leave no doubt in the mind of the court that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established. If the answer should not be full on all material points, the court may presume that the fact of fraud may be capable of proof in the point not fully answered, and may therefore not deem the answer sufficient to support the plea as conclusive, and therefore may overrule the plea absolutely or only as an immediate bar, saving the benefit of the plea to the hearing of the cause. But, though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer, if he conceives it not to be so full to all the charges as to be free from exception; or by amending his bill may require an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant, or to which he may apprehend that the answer, though full in terms, may have been in effect evasive.

“As the bill must be founded on the supposition that the plaintiff's title is not concluded by the decree, and the plea on the contrary supposition, the effect of the plea is to conclude the whole case made by the bill, so far as it may be concluded by the decree; and consequently all the questions which might have been raised, if the decree had not been made, are put by the plea, if allowed, wholly out of the case, unless the plea should be shown to be false in fact by evidence given on the issue taken upon it, and the matter of the plea thus opened upon the hearing. It is therefore a mistake to suppose that the plea, if sustained, would not shorten the cause or lessen expense.”¹

The principles applied to an anomalous plea interposed to a bill filed to impeach a decree for fraud are alike applicable to pleas interposed to bills filed to impeach for fraud awards, re-

¹Redesdale (6th Am. ed.), 281-286.

leases, deeds, accounts stated, and in all other cases where the bill has anticipated a legitimate plea, and has charged an equity in avoidance of it.¹

§ 229. **The necessary averments of a plea.**— There are two classes of averments of a plea in equity. (1) The office of the first class of averments is to state the facts which constitute the real substantive defense relied on to bar the bill. In this class of averments should be stated every ultimate fact which is necessary to constitute the bar. If the bar relied on be a decree which is impeached by the bill, the decree should be fully stated, although its existence may be admitted by the bill. If the bar relied on be that of a *bona fide* purchaser, for a valuable consideration, without notice of plaintiff's title, the plea, in this class of its averments, should state every substantive fact necessary to constitute that defense. Whatever may be the character of the defense relied on in the plea, these averments should contain a clear, direct and positive statement of all the facts necessary to render the plea a complete legal and equitable bar to the case made by the bill, or to that part of it to which the plea extends. A plea must state facts, as contradistinguished from arguments, inferences and conclusions of law; and the facts must be stated with the same certainty, strictness and exactness as in a plea in an action at law. A plea which avers a conclusion of law, without stating the facts which lead to that conclusion, is bad. It is the duty of the defendant to plead the facts, in order that the plaintiff may take issue upon them; and the defendant should not assume to himself the province of the court, to whom it belongs to draw the legal conclusions from the facts.²

(2) The office of the second class of averments of a plea is, not to set up the bar itself, but to exclude intendments against the operation of the bar. These averments are inserted in the plea to negative the special matter set up in the bill to an-

¹ 2 Daniell, 100; Adams' Eq. 338; 346, 347; Beames' Pleas in Equity, Allen v. Randolph, 4 Johns. Ch. 693; 24-29; 2 Daniell, 107, 108; Story's Fish v. Miller, 5 Paige Ch. 26; Bogardus v. Trinity Church, 4 Paige Ch. 178; Bolton v. Gardner, 3 Paige Ch. 273.

² Redesdale (6th Am. ed.), 281-284, v. Briggs, 9 Paige Ch. 595.

ticipate and avoid the bar set up in the plea; and such averments are necessary to the validity of the plea, for if there are any charges in the bill, such as fraud or notice of title, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, or if there is alleged in the bill any fact or facts which, if admitted to be true, would be evidence to counterprove the averments of fact constituting the bar set up by the plea, the court will conclude such matters to be true as against the pleader, unless they are met by averments in the plea; and the office of such averments is to exclude the intendments and conclusions of the court against the truth of the plea. The office of this class of averments in the plea is to meet and deny all matter in the bill intended to avoid the defense contained in the plea; and they are absolutely essential to the validity of the plea, for every fact stated in the bill and not denied by the plea must be taken as true. If the bar relied on in the plea be a decree, or a release, or an award, or an account stated, or any other matter which is impeached by the bill for fraud, the plea should, in the second class of its averments, negative all the facts and circumstances set up in the bill to establish the fraud. If the bar relied on be that of innocent purchaser, the plea must negative all the facts alleged in the bill to charge defendant with notice. In every case where there is any statement or charge in the bill, which, if uncontradicted, would avoid the effect of the matter pleaded, such statement or charge must be denied by averment in the plea.¹

§ 230. Statement of the extent of the plea.—The defendant may, as we have seen, demur or plead to the whole bill or to part of it, and he may demur to a part, plead to a part, and answer to the residue;² and he may plead several separate pleas to different and distinct parts of the bill.³ But whenever a plea or demurrer does not extend to the whole bill, or there is a demurrer as to one part and a plea to another part, or separate pleas to distinct parts of the bill, the plea or demurrer should

¹ 2 Daniell, 109-112; *Bogardus v. Stearns v. Page*, 1 Story, 240, Fed. Trinity Church, 4 Paige Ch. 195; Cas. No. 13,339.

Allen v. Randolph, 4 Johns. Ch. 493; ² Equity Rule 32; *Livingston v. Redesdale* (6th Am. ed.), 281-286; Story, 9 Pet. 632; 2 Daniell, 106.

³ 2 Daniell, 105, 106.

clearly express what part of the bill it is intended to cover, or the particular parts to which each defense is intended to be applied.¹ An equity rule provides that: "No demurrer or plea shall be held bad and overruled upon argument because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."² This rule does not allow the defendant to demur to the whole bill and answer to the whole bill at the same time; the effect of such pleading is that the plea is taken as a waiver of the demurrer, and the answer as a waiver of the plea.³ The thirty-seventh equity rule applies only in cases where the demurrer or plea extends to only a part of the bill, and the answer is intended to cover the residue. Under the practice as it existed previous to the adoption of this rule, if the plea was to a part only and the answer to the remainder, and such answer by inadvertence or otherwise referred to the matter covered by the plea, the effect was to overrule the latter; and this rule was intended to obviate that hardship.⁴ Another equity rule provides that: "No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to."⁵

§ 231. Plea bad in part and good in part.—The rule that a demurrer cannot be bad in part and good in part is not applicable with the same strictness to a plea, for it has been repeatedly decided that a plea in equity may be bad in part and not in the whole, and the court will allow it to so much of the bill as it is properly applicable to; but this rule is to be understood with reference to the extent of the plea; that is, to the quantity of the bill covered by it, and not to the ground of the defense offered by it, and if any part of the defense made by the plea is bad the whole must be overruled.⁶ It is a well settled rule in

¹ Van Hook v. Whitlock, 3 Paige Ch. 409, 418; 2 Daniell, 106; Redesdale (6th Am. ed.), 351. 574; Bolton v. Gardner, 3 Paige Ch. 273; Lacraft v. Dempsey, 4 Paige Ch. 124.

² Equity Rule 37.

⁴ Huntington v. Laidley, 79 Fed. R. 865.

³ Crescent City & C. Co. v. Butchers' Union & C. Co., 12 Fed. R. 225, 226; Clark v. Phelps, 6 Johns. Ch. 214; Souzer v. De Meyer, 2 Paige Ch.

⁵ Equity Rule 36.

⁶ Beames' Pleas in Equity, 46; 2 Daniell, 106, 107.

chancery that a plea may be good in part and bad in part; and where a plea is more extensive than the subject-matter to which it relates, it will be allowed to stand as to so much of the bill to which it properly applies, and the defendant must answer as to the residue.¹

§ 232. **Answer in support of a plea.**— When should a plea be supported by an answer? The solution of this question depends upon the solution of the two further questions, namely: (1) What issue of fact is raised by the plea? and (2) What is the office of an answer in support of a plea? “Nothing can be in issue on a plea but that which is contained in the plea; and every charge in the bill not negatived by the plea is taken to be true on argument of the plea.”² And at the hearing upon plea, replication and proofs, no fact is in issue between the parties but the truth of the matter pleaded.³ If the plaintiff in his bill alleges any fact or facts in avoidance or disproof of the defense set up by the plea, the plea must, to be valid, negative those facts, and they are thereby put in issue. If the bill be brought to impeach a decree, or a release, or an award, or an account stated, for fraud, it must set up the facts which constitute the fraud, and, at the option of the pleader, may set up in detail the probative facts and circumstances which prove the fraud; and the defendant interposing a plea to such bill must in his plea state the decree, or release, or award, or account stated, as the case may be, and must, in like manner, in his plea deny the allegations of the bill setting up the facts constituting the fraud, and must also deny the circumstances set up in proof of the fraud; and such a plea puts in issue all matters of fraud charged in the bill. And if the decree, or release, or award, or account stated is not admitted by the bill, but is set up by way of pretense only, then it is also in issue. But if the decree, or release, or award, or account stated is admitted by the bill by a substantive allegation, then the only issue raised by the plea is the fraud and the circumstances charged in proof of it, and all other matters in the bill are admitted to be true. If the plaintiff bring a bill to recover an

¹French v. Shotwell, 5 Johns. Ch. 555.

³Farley v. Kittson, 120 U. S. 303, 318; Rhode Island v. Massachusetts,

²Redesdale (6th Am. ed.), 283, 284. 14 Pet. 210.

estate, and, anticipating that defendant will claim that he is an innocent purchaser, alleges that defendant had notice of plaintiff's claim and title, and charges facts and circumstances from which notice may be inferred, the defendant, pleading that he is an innocent purchaser, must aver all the facts which are necessary to constitute that defense, and must by averments in his plea deny all the facts and circumstances charged in the bill as evidence of notice, and such facts are then in issue; and no fact is in issue except the matters contained in the plea, and all other allegations in the bill are by defendant's form of pleading admitted to be true.¹ In the instances above given as illustrations, the plea being held good upon argument, the plaintiff must file the general replication, and go to the proof upon the issue raised by the plea;² and upon the trial of such issue, the existence of the decree, release, award or account stated being admitted by the bill, the burden is on the plaintiff to prove the fraud charged in the bill to avoid the defense set up in the plea.³ Now, inasmuch as upon the trial of the issue raised by the plea the burden is upon the plaintiff to prove his case, in so far as it is not admitted by the plea, he is, under the cardinal principles of equity pleading, entitled to a discovery from the defendant to prove or to aid in the proof of his case; and the fact that the defendant defends by plea instead of by answer cannot deprive the plaintiff of his right to discovery. Where the defense is by plea, the plaintiff is entitled to all the discovery that may be necessary to try the truth and validity of the plea, and this right, so far as the matter of the plea is concerned, is just as extensive when the defense is made by plea as when it is made by answer.⁴ But, as no discovery can be given in a plea,⁵ the defendant is required to give the appropriate discovery in an answer in support of his plea, as it is one

¹ Redesdale (6th Am. ed.), 281, 286; Beames' Pleas in Equity, 24-33; Allen v. Randolph, 4 Johns. Ch. 693; Bogardus v. Trinity Church, 4 Paige Ch. 178; 2 Daniell, 108, 109, 110, 111, 112; Bolton v. Gardner, 3 Paige Ch. 273; Rhode Island v. Massachusetts, 14 Pet. 210.

² United States v. Dalles Military Road Co., 140 U. S. 599, 634; Rhode Island v. Massachusetts, 14 Pet. 210.

³ Langdell's Eq. Pl., sec. 101.

⁴ Wigram on Discovery, 11, 12; Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339; Everet v. Watts, 10 Paige Ch. 82; Redesdale (6th Am. ed.), 284, 285.

⁵ 2 Daniell, 112, 113; Heart v. Corning, 3 Paige, 566; Farley v. Kittson, 120 U. S. 303, 318.

of the offices of an answer to give discovery.¹ The answer in such case is no part of the defense; it is nothing more than the plaintiff has a right to require, as evidence for the purpose of trying the truth and validity of the plea.²

In order to fully understand the office of an answer in support of a plea it is necessary to recur to the peculiar character of the pleadings and proceedings in a suit in equity. A bill in equity is (1) a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which plaintiff's right to relief depends; and (2) the bill is an examination of the defendant upon oath for the purpose of obtaining evidence to establish the plaintiff's case, or to disprove the defense which may be set up by the defendant.³ And the answer of defendant embraces two things which are essentially distinct from each other, namely: (1) The defense of the defendant to the case made for relief by the bill against him; and (2) the examination of the defendant, consisting of the discovery sought by the bill, to prove the plaintiff's case, and to disprove the defense of the defendant.⁴ And it is in the latter sense only that a plea is required to be supported by an answer; the office of such answer is, not to defend the action, but to furnish the plaintiff evidence to try the truth and validity of the plea.⁵

§ 233. Same — When required.—As we have seen, an answer in support of a plea is no part of the defense, but is merely discovery to be used in trying the truth and validity of the plea. The whole office and function of such an answer is to give evidence, and not to make defense to the bill; its office is discovery, and not defense. The next inquiry then is, when should a plea be supported by an answer? or in what cases is a defendant required to accompany his plea by discovery to be used on the trial of the truth and validity of the plea? The rule has been stated as follows: "The cases in which it is nec-

¹ Wigram on Discovery, 11, 94, 113, 114, 143; Hare on Discovery, 223, 224.

² Hare on Discovery, 25; Wigram on Discovery, 11, 12.

³ Hawley v. Wolverton, 5 Paige Ch. 522, 523; Mechanics' Bank v. Levy, 3 Paige Ch. 606; Stafford v. Brown, 4 Paige Ch. 88-91.

⁴ Wigram on Discovery, 11, 94, 113, 114, 143; Hare on Discovery, 223.

⁵ Wigram on Discovery, 11, 12; Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339; Everet v. Watts, 10 Paige Ch. 82; Redesdale (6th Am. ed.), 284, 285.

essary that a plea should be supported by an answer have been conveniently divided into, 1st, those where the plaintiff admits the existence of a legal bar, and charges some equitable circumstance to avoid its effect; and 2d, those where the plaintiff does not admit the existence of the legal bar, but states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of the plea."¹

Lord Redesdale states the rule as follows: "And as the plaintiff is entitled to have the answer of the defendant upon oath to any matter in dispute between them, in aid of proof of the case made by the bill, the defendant must answer to the facts of fraud alleged in the bill so fully as to leave no doubt in the mind of the court that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established. If the answer should not be full in all material points, the court may presume that the fact of fraud may be capable of proof in the point not fully answered, and may therefore not deem the answer sufficient to support the plea as conclusive, and therefore may overrule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. But though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer if he conceives it not to be so full to all the charges as to be free from exception; or by amending his bill may require an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant, or to which he may apprehend that the answer, though full in terms, may have been in effect evasive."² Where the plaintiff states a variety of matters in the bill which if admitted to be true would be evidence to counterprove the allegations of the plea, it is necessary to negative such matters by general averments in the plea, and to support the plea by an answer as to such matters; and upon the argument of a plea, every fact stated in the bill and not denied by the averments in the plea, and by an answer in support of the plea, must be taken as true.³

¹ 2 Daniell, 113, 114; Hare on Discovery, 30.

² Redesdale (6th Am. ed.), 284-286.

³ Bogardus v. Trinity Church, 4

Paige Ch. 178; Clark v. Phelps, 6 Johns. Ch. 214; Souzer v. De Meyer, 2 Paige Ch. 574.

§ 234. **Same—Equity rule.**—A United States equity rule provides that: “In every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination and the facts on which the charge is founded.”¹

§ 235. **Same—Discovery of documents.**—“Wherever the bill states or charges any facts which are inconsistent with the defendant’s plea, or which would take the plaintiff’s case out of the operation of it, and charges that the defendant has in his possession documents from which the matters in the bill mentioned would appear, then it will be necessary to accompany the plea by a discovery of the documents in the defendant’s possession; for as the introduction of such matter in the bill renders it imperative on the defendant to accompany his plea by an answer as to those facts, that answer, to be complete, must extend to the documents inquired after; because, as they are charged to relate to the matters before mentioned, and the facts which go to negative the defendant’s plea are amongst those matters, it may happen that the documents in the possession of the defendant will afford important evidence to enable the plaintiff to avoid the effect of the plea.”²

§ 236. **Test of the sufficiency of answer in support of plea.** The answer in support of a plea, to be sufficient, must be co-extensive with the plaintiff’s right to discovery upon the issues made by the plea. Chancellor Walworth stated the rule as follows: The only way of testing the sufficiency of an answer in such a case is to consider every allegation in the bill as true which is not sufficiently denied by the answer, and then to inquire whether, those facts being admitted, the plea is a sufficient bar to the claim of the plaintiff for relief. Such objection necessarily connects itself with the merits of the defense set up in the plea; for, upon argument of a plea, every fact stated in the bill, and not denied by the averments in the plea and by an answer in support of the plea, must be taken as true.³

¹ Equity Rule 32.

² 2 Daniell, 129, 130.

³ *Bogardus v. Trinity Church*, 4 Paige Ch. 178.

And this rule is adopted and followed by the United States supreme court.¹

§ 237. Answer in support of plea evidence for defendant.

When defendant files a plea and an answer in support of the plea, the answer, in so far as it is responsive to the allegations of the bill and states facts within the knowledge of defendant, is evidence in favor of the defendant of the facts averred in the plea, and, unless disproved by two witnesses, or by one witness and corroborating circumstances, the answer must prevail; for, upon the trial of an issue of fact upon a plea and an answer in support thereof, as well as upon answer and replication, no decree can be made, against a positive denial of a defendant, of any matter within the knowledge of defendant and directly charged in the bill, on the testimony of a single witness unaccompanied by corroborating circumstances.²

§ 238. Answer in subsidium of a plea.—There is but little said in the books in regard to this character of pleading. Lord Chief Baron Gilbert said: "You may answer anything which is not charged in the bill *in subsidium* of your plea, as you may deny notice in your plea, because that is not putting anything in issue which you would cover by your plea from being put in issue, but it is adding by way of answer that which will support your plea, and not an answer to a charge in the bill which by your plea you would decline."³ Lord Redesdale said: "A defendant may also support his plea by an answer touching anything not charged by the bill, as notice of a title or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue, and the answer can only be used to support or disprove the plea."⁴ Mr. Daniell, in concluding his observations upon the subject of answers in support of pleas, said: "It is to be observed that the cases above referred to, as requiring that a plea should be accompanied by an answer, are those only in which some fact or matter is stated or charged in the bill which, if true, would have the effect of overruling the plea; there are cases, how-

¹ Harpending v. Reformed Dutch Church, 16 Pet. 487. Fed. Cas. No. 6,845; affirmed by U. S. supreme court, 6 Wheat. 453.

² Hughes v. Blake, 1 Mason, 515,

³ For. Rom. 58.

⁴ Redesdale (6th Am. ed.), 350.

ever, in which, even though no equitable circumstances are alleged in the bill to defeat the bar offered by the plea, when in fact a pure plea may be pleaded, yet the defendant may support his plea by an answer touching matters not charged in the bill. Thus, in case of a plea of purchaser for valuable consideration, a defendant may deny notice in his answer as well as in his plea, because by so doing he does not put anything in issue which he would cover by his plea from being put in issue. A defendant may also by this means put upon the record any fact which tends to corroborate his plea, so as to enable him afterwards to prove it. An answer of this sort is termed an answer in aid or *in subsidium* of the plea, and differs from what is usually termed an answer in support of a plea in being an answer which the defendant is not obliged to put in for the purpose of avoiding the effect of any equitable ground which may be alleged in the bill for avoiding the bar offered by the plea.”¹

§ 239. Jurisdictional objection in equity should be taken by special plea.—If an objection to the jurisdiction appear upon the face of the bill it should be raised by demurrer.² But if the objection does not appear upon the face of the bill it should be raised by plea. It is a general rule in courts of equity, as well as in courts of common law, that objections to the jurisdiction of the court, and which do not appear upon the face of the bill, being of a preliminary nature, should be presented at the earliest opportunity by a special plea to the jurisdiction, and cannot be availed of in a general answer to the merits, which necessarily admits the jurisdiction of the court and waives the objection; and this rule was adopted at an early day in suits in equity in the circuit courts of the United States, and has been fully sustained and established by the supreme court by a long line of decisions which hold that: The jurisdictional facts being properly averred by the plaintiff cannot be put in issue upon the merits, but that the objection to the jurisdiction must be brought forward at an earlier stage in the proceedings by a plea to the jurisdiction, and that a plea or answer to the merits

¹2 Daniell, 134, 135.

How.210; Fishback v. Western Union

²Southern Pac. Co. v. Denton, 146 Tel. Co., 161 U. S. 96, 101.

U. S. 202; Maxwell v. Kennedy, 8

is a waiver of the objection to the jurisdiction. When the defendant submits the merits of the case to be heard by the court upon the pleadings and the evidence, he thereby admits that the court has jurisdiction to hear and determine the cause, and waives all exceptions to the jurisdiction. All pleas to the jurisdiction are objections to entering into a hearing upon the merits, and must precede the filing of any defense to the merits. This rule is a fundamental principle of universal law; it was the rule of the Roman civil law and of the English common law, and was adopted by the English High Court of Chancery; it pervades the jurisprudence of the states of the American Union; and it is the settled doctrine of the supreme court of the United States that when the jurisdiction of the circuit courts of the United States appears by a proper averment of the jurisdictional facts upon the record, that jurisdiction can be impugned only by special plea to the jurisdiction.¹ And one of the United States equity rules excludes from defendant's answer all dilatory matters, and confines it to matters in bar or to the merits of the bill.²

§ 240. Definition of pleas to the jurisdiction.—A plea to the jurisdiction is one which denies that the court has jurisdiction of the cause. This plea does not deny the capacity of the plaintiff to institute and prosecute the suit, nor that the plaintiff sustains the character in which he sues, nor does it dispute the truth or validity of the rights of plaintiff in the subject-matter of the suit; it simply shows by proper averments, either negative or affirmative, or both, as the special circumstances of the case may require, that the court has no jurisdiction to hear and determine the cause; the sole issue presented by such plea is whether or not the court has jurisdiction

¹ *Livingston v. Story*, 11 Pet. 351, 359; *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952; *Wickliffe v. Owings*, 17 How. 47; *De Wolf v. Rahaud*, 1 Pet. 498; *Evans v. Gee*, 11 Pet. 83; *Sims v. Hundly*, 6 How. 1; *Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 How. 81; *De Sobry v. Nicholson*, 8 Wall. 423; *Sheppard v. Graves*, 14 How. 505, 512; *Scott v. Sandford*, 19 How. 393, 633; *Farmington v. Pills-*

bury, 114 U. S. 138, 146; *Blackly v. Davis*, 1 McLean, 412, Fed. Cas. No. 1,456; *Evans v. Davenport*, 4 McLean, 574, Fed. Cas. No. 4,558; *Fremont v. Merced Min. Co.*, 1 McAll. 267, Fed. Cas. No. 5,095; *For. Rom.* (1st Am. ed. by Tyler), 49, 50; *Penn v. Lord Baltimore*, 1 Ves. Sr. 443; *Gould's Pl.*, ch. 5, sec. 13; *Bac. Abr.*, Pleas & Pl., A. & E. 1, 2.

² Equity Rule 39.

of the suit.¹ The plea concludes by praying judgment if the court will take or hold further cognizance of the suit, or whether the court will hold plea upon and enforce the defendant to answer the bill for the cause aforesaid, or, simply, whether the court will compel the defendant to make further answer to the bill.² In one of the cases cited the plea to the jurisdiction, omitting the title and heading, was as follows: "That this court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were and still are, all, each and every one, citizens of the state of Massachusetts, and the said plaintiffs, at the time of filing said bill, were not, and still are not, all, each and every one, citizens of another state, but that the said Nashua and Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was, and still is, a corporation duly established and existing under and by virtue of the laws of the state of Massachusetts, and, at the time of filing said bill, was not, and still is not, a corporation established and existing by the laws of the state of New Hampshire, and a citizen of said state of New Hampshire. All of which matters and things defendants do aver to be true and are ready to verify. Wherefore they plead the same to said amended bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to said bill."³

§ 241. Classification of pleas to the jurisdiction.—In all suits in equity in the circuit courts of the United States, the facts upon which the jurisdiction of the court rests must ap-

¹ Gould's Pl., ch. 5, sec. 13; Redesdale (6th Am. ed.), 260; Beames' Pleas in Equity, 57; 2 Daniell, 137, 138; De Wolf v. Rabaud, 1 Pet. 498; Evans v. Gee, 11 Pet. 83; Sims v. Hundly, 6 How. 1; Smith v. Kernochen, 7 How. 216; Jones v. League, 18 How. 81; De Sobry v. Nicholson, 3 Wall. 423; Massachusetts & Southern Const. Co. v. Cane Creek Twp., 155 U. S. 283; Ohio & Miss. R. Co. v. Wheeler, 1 Black (66 U. S.), 286, 298; Penn. R. Co. v. St. Louis R. Co., 118 U. S. 290, 321; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.,

136 U. S. 356, 385; Railroad & Coal Co. v. Blatchford, 11 Wall. 172; Imperial Refining Co. v. Wyman et al., 38 Fed. R. 574; Mollan v. Torrance, 9 Wheat. 538; Farmington v. Pillsbury, 114 U. S. 138, 146; Chicago & Northwestern R. Co. v. Ohle, 117 U. S. 123, 129.

² Beames' Pleas in Equity, 50; 2 Daniell, 210; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 136 U. S. 356, 385.

³ Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 136 U. S. 356, 385.

pear in the record;¹ and in any such suit in equity, any fact upon which the jurisdiction of the court is made to rest, and the existence of which is, under the constitution and laws of the United States, essential to sustain the jurisdiction of the court, if averred by the plaintiff, may be controverted by the defendant by a plea to the jurisdiction before pleading to the merits; and the plea, if sustained by proof, will be effectual to secure a dismissal of the suit.² While there may not be precedents in the adjudicated cases for a full and complete classification of pleas to the jurisdiction in suits in equity in the circuit courts of the United States, yet, following the federal judiciary act³ now in force, such pleas may be classified as follows: (1) That the subject-matter of the suit is not within the jurisdiction of a court of equity. (2) That the suit is not one arising under the constitution or laws of the United States, or treaties made under their authority. (3) That the suit does not involve a controversy in which the United States are the real plaintiffs, though nominally so. (4) That the suit does not involve a controversy between citizens of different states. (5) That the suit does not involve a controversy in which citizens of the same state are claiming lands under grants from different states. (6) That the suit does not involve a controversy between a citizen of a state and a foreign state, citizen or subject. (7) That the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000. (8) That the suit, where brought by an assignee, could not have been prosecuted if no assignment or transfer had been made. (9) A plea of personal privilege, claiming the right to be sued in another district.

§ 242. Plea that the subject-matter of the suit is not within the jurisdiction of a court of equity.—“A case which

¹ *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 101.

² *Livingston v. Story*, 11 Pet. 351, 359; *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952; *Wickliffe v. Owings*, 17 How. 47; *De Wolf v. Ra-
baud*, 1 Pet. 498; *Evans v. Gee*, 11 Pet. 83; *Sims v. Hundly*, 6 How. 1; *Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 How. 81; *De
Sobry v. Nicholson*, 3 Wall. 423;

Sheppard v. Graves, 14 How. 505, 512; *Scott v. Sandford*, 19 How. 393, 633; *Farmington v. Pillsbury*, 114 U. S. 138, 146; *Blackly v. Davis*, 1 McLean, 412, Fed. Cas. No. 1,456; *Evans v. Davenport*, 4 McLean, 574, Fed. Cas. No. 4,558; *Fremont v. Merced Min. Co.*, 1 McAll. 267, Fed. Cas. No. 5,095.

³ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

is not really such as will give a court of equity jurisdiction cannot easily be so disguised in a bill as to avoid a demurrer; but there may be instances to the contrary, and in such cases it should seem a plea of the matters necessary to show that the court has no jurisdiction of the subject, though perhaps unavoidably in some degree a negative plea, would hold. Thus, if the jurisdiction was attempted to be founded on the loss of an instrument, where, if the defect arising from the supposed accident had not happened, the courts of ordinary jurisdiction could completely decide upon the subject, perhaps a plea showing the existence of the instrument, and that it was in the power of the plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a plaintiff, by alleging a falsehood in his bill, should be permitted to involve the defendant in the expense of a suit in equity, though the bill may finally be dismissed at the hearing of the cause if the defendant answers the case made by it and enters into his defense at large.”¹

§ 243. Plea of personal privilege.—The judiciary act provides: “But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”² This provision of the act of congress prescribing the district in which a person may be sued is not one affecting the general jurisdiction of the court; but it is a provision conferring a personal privilege upon the defendant, exempting him from suit in any district except the district of the residence of either the plaintiff or defendant; such personal privilege is, however, one which the defendant may waive, and which he does waive, by entering a general appearance and pleading to the merits of the cause, without first insisting upon

¹ Redesdale (6th Am. ed.), 260, 261. p. 552; 25 U. S. Stat. at L., ch. 866,

² 24 U. S. Stat. at L., ch. 373, sec. 1, sec. 1, p. 434.

his privilege. If there is diversity of citizenship, and the requisite pecuniary value involved, a defendant may consent to be sued in any district he pleases, and such consent is evidenced by his failure to insist on his privilege before entering a general appearance and pleading to the merits, when sued in a district in which neither he nor the plaintiff resides; and the jurisdiction of the court will not be ousted because the defendant has consented to waive his privilege. The circuit courts of the United States are by the federal statutes vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by a general appearance without taking the objection.¹ If the defendant intends to insist upon his privilege, he should enter a special and limited appearance for the purpose of objecting to the jurisdiction of the court over him, and should then file a plea to the jurisdiction, and secure the action of the court upon it, before pleading to the merits; and, if the objection be overruled, the defendant may then plead to the merits without waiving the objection.²

§ 244. Plea denying that jurisdictional amount is in dispute.—In the judiciary act now in force it is provided: "That

¹ *Ex parte Schollenberger*, 96 U. S. 369, 378; *Texas & Pacific Ry. Co. v. Saunders*, 151 U. S. 105, 109; *Central Trust Co. of New York v. McGeorge*, 151 U. S. 129, 135; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 131; *Toland v. Sprague*, 12 Pet. 300, 330; *Pollard v. Dwight*, 4 Cranch, 421; *Barry v. Foyles*, 1 Pet. 311; *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98; *Gracie v. Palmer*, 8 Wheat. 699; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 206; *Interior Const. & Imp. Co. v. Gibney*, 160 U. S. 217, 220.

² *Southern Pacific Co. v. Denton*, 146 U. S. 202.

the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution and laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.”¹ It has been made a question whether or not, under this statute, the circuit courts of the United States are given jurisdiction in any civil suit where the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000; and it was held on the circuit that the circuit courts were, by this statute, deprived of jurisdiction in all civil suits where the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000.² But the supreme court of the United States has held that the jurisdictional amount of \$2,000 is, by the statute, made requisite in only the following classes of suits, namely: (1) Suits arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority. (2) Suits in which there shall be a controversy between citizens of different states. (3) Suits in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects. And the jurisdictional amount of \$2,000 does not apply to the following classes of cases enumerated in the statute, namely: (1) Suits in which the United States are plaintiffs or petitioners. (2) Suits between citizens of the same state claiming lands under grants from different states.³ In suits falling within either of the first three

¹ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

³ *United States v. Sayward*, 160 U. S. 493, 498.

² *United States v. Huffmaster*, 35 Fed. R. 81, 83.

classes, the jurisdictional amount being averred, the plaintiff may contest the jurisdiction of the court by filing a plea denying that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.¹

§ 245. Plea denying diversity of citizenship.—Where the jurisdiction of the court is invoked upon the ground that the suit is one in which there is a controversy between citizens of different states, and the jurisdiction of the court appears by proper averments, upon the record, of the jurisdictional facts, and the defendant desires to object to the jurisdiction upon the ground that the requisite diversity of citizenship does not in reality exist, he should file a special plea to the jurisdiction, traversing the averments made to show jurisdiction.² It is the better practice to draw the plea to the jurisdiction in the form of a special traverse; that is, by averring the facts on which the defendant relies to show that, in point of law, there is no diversity of citizenship, and basing the traverse upon those facts as a deduction therefrom. By this form of pleading opportunity is given to present directly to the court, by argument of the plea, the sufficiency of the facts alleged to negative, in point of law, the plaintiff's averment of diverse citizenship; and it also operates as a notice to the plaintiff of the case he is required to meet.³ The plea should show the citizenship at the time the suit was brought.⁴

¹ *Wetmore v. Rymer*, 169 U. S. 115, 128; *Barry v. Edmunds*, 116 U. S. 550, 566; *Smith v. Greenhow*, 109 U. S. 669, 671; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

² *Wickliffe v. Owings*, 17 How. 47; *Smith v. Kernochen*, 7 How. 198; *Dred Scott v. Sandford*, 19 How. 393, 633; *Railroad & Coal Co. v. Blatchford*, 11 Wall. 172; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 136 U. S. 356, 385; *Penn. R. Co. v. St. Louis R. Co.*, 118 U. S. 290, 321; *Ohio & Miss. R. Co. v. Wheeler*, 1 Black (66 U. S.), 286, 298; *Massachusetts & Southern Const. Co. v. Cane Creek Township*, 155 U. S. 283; *Gilmer v.*

City of Grand Rapids, 16 Fed. R. 708; *De Wolf v. Rabaud*, 1 Pet. 498; *Evans v. Gee*, 11 Pet. 83; *Sims v. Hundly*, 6 How. 1; *Jones v. League*, 18 How. 81; *De Sobry v. Nicholson*, 3 Wall. 423; *Imperial Refining Co. v. Wyman*, 38 Fed. R. 574; *Sheppard v. Graves*, 14 How. 505; *Rateau v. Bernard*, 3 Blatchf. 244, Fed. Cas. No. 11,579; *Wythe v. Myers*, 3 Sawy. 595, Fed. Cas. No. 18,119.

³ *Dred Scott v. Sandford*, 19 How. 393, 633; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 136 U. S. 356, 385.

⁴ *Mollan v. Torrance*, 9 Wheat. 537.

§ 246. **Plea to jurisdiction in suits by assignees.**—The judiciary act now in force provides: “Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”¹ In suits under this provision of the statute, it is necessary that the bill shall contain an averment of the facts showing that the suit could have been maintained by the assignor of the chose in action if no assignment had been made.² And if the bill should untruthfully aver facts making out a case within the jurisdiction of the court, the defendant may challenge the jurisdiction by a plea traversing the facts averred in the bill to show that the suit could have been maintained by the assignor if no assignment had been made.³

§ 247. **When jurisdictional objection may be raised under the act of 1875.**—By the fifth section of the act of congress of March 3, 1875, it is provided: “That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ

¹ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434.

² *Corbin v. Black Hawk County*, 105 U. S. 659, 667; *Mollan v. Torrance*,

9 Wheat. 537; *Bank v. Moss*, 6 How. 31; *Bradley v. Rhines*, 8 Wall. 393.

³ *Sere v. Pitot*, 6 Cranch, 332.

of error or appeal, as the case may be." This section has been continued in force by subsequent legislation.¹

§ 248. Reason and policy of the statute.—This statutory provision was, in the opinion of the legislative branch of the government, as interpreted by the supreme court, rendered necessary by reason of the fact that the restrictions imposed by the original judiciary act upon suits by assignees and transferees were, to a very great extent, removed by the first section of the act of March 3, 1875, which opened wide the door for frauds upon the jurisdiction of the circuit courts by collusive transfers and assignments, so as to make colorable parties and create cases cognizable by the courts of the United States; and to protect the courts as well as the parties against such frauds upon their jurisdiction, the fifth section of the act was inserted, by which it is made the duty of the circuit court, upon their own motion, to dismiss or remand, as the case may require, any suit pending before them, at any time whenever it appears that such suit does not really and substantially involve a suit or controversy properly within its jurisdiction, or that the parties have been improperly or collusively joined for the purpose of creating a case under the act. This statutory provision is directed against frauds upon the jurisdiction of the circuit courts, and if the court is led, from any source, to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it is the duty of the court, of its own motion, to at once cause the necessary inquiry to be made, by having the proper issue joined and tried, and act as justice may require for its own protection against fraud or imposition.²

§ 249. Procedure under the act of 1875.—This act of congress does not abrogate the former judicial procedure followed in the circuit courts of the United States in raising and disposing of objections to the jurisdiction; nor does it prescribe any new procedure to be pursued under the act. The raising of an

¹ 18 U. S. Stat. at L., ch. 137, sec. 5, 209, 213; *Farmington v. Pillsbury*, p. 472; 24 U. S. Stat. at L., ch. 373, sec. 114 U. S. 138, 146; *Hartog v. Memory*, 6, p. 552; 25 U. S. Stat. at L., ch. 866, 116 U. S. 588, 592; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 389; 25 U. S. Stat. at L., ch. sec. 6, p. 434; 26 U. S. Stat. at L., sec. 1, p. 693; *Morris v. Gilmer*, 129 U. S. 315, 329; 236, sec. 1, p. 693; *Shreveport v. Cole*, 129 U. S. 36, 44; ch. 517, sec. 5, p. 826.

² *Williams v. Nottawa*, 104 U. S. Wetmore v. Rymer, 169 U. S. 115, 128.

issue of fact as to the jurisdiction of the court, and its disposition, constitute a judicial proceeding, involving pleadings, evidence, trial, decision of the fact, and the judgment or decree of the court. The appropriate judicial procedure upon such an issue was definitely known, recognized and established in the federal courts long before the act of 1875, and it cannot be presumed that congress intended to abolish that procedure unless such purpose was expressed in the act. While the language found in the decisions of the supreme court upon this subject is a little variant, yet it may be safely assumed that the result of all the cases¹ is to establish the following propositions, namely: (1) The statute does not prescribe any procedure upon the subject. (2) If, at any time after the suit is brought and before it is finally disposed of, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once of its own motion cause the necessary inquiry to be made as to whether or not the suit does really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or whether the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act. (3) The parties to be affected by the dismissal must have reasonable notice of the action of the court in directing the inquiry. (4) After the inquiry is directed by the court, an issue upon the ultimate facts of jurisdiction should be made or joined and tried by some appropriate pleading and procedure. (5) The action of the court upon the issues of fact must be based upon legal and pertinent evidence; and both parties must be given full opportunity to adduce their evidence upon the issues of fact. (6) The decision of the circuit court is reviewable by the supreme court on writ of error or appeal, as the case may be; and, therefore, all of the proceedings, including the evidence, should be made of record, to enable the losing party to

¹ Wetmore v. Rymer, 169 U. S. 115, 128; Deputon v. Young, 134 U. S. 241, 260; Morris v. Gilmer, 129 U. S. 315, 329; Shreveport v. Cole, 129 U. S. 36, 44; Chicago & Northwestern R. Co. v. Ohle, 117 U. S. 123, 129; Hartog v. Memory, 116 U. S. 588, 592; Barry v. Edmunds, 116 U. S. 550, 566; Farmington v. Pillsbury, 114 U. S. 138, 146; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 389; Williams v. Notawa, 104 U. S. 209, 213.

invoke the appellate jurisdiction of the supreme court to review the order of the lower court. (7) As to the weight of evidence required to defeat the jurisdiction upon an issue of fact, it is held that: "A suit cannot properly be dismissed by a circuit court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear upon the record create a legal certainty of that conclusion."

§ 250. Same — Formal plea to the jurisdiction the simplest method.— The loose and informal practice which has prevailed in some circuits in presenting the jurisdictional objection under the act has resulted in confusion in the circuit court,¹ and embarrassment to the supreme court,² growing out of the confused state of the record upon appeal; and one case³ was reversed because the plaintiff was not given opportunity to obtain his proof upon the issues of fact raised by the objection. This confusion and embarrassment would be obviated by adhering to the established rule requiring the objection to be presented by a formal and special plea to the jurisdiction. The court, when it directs the inquiry into the jurisdiction, could also direct the defendant to file a plea stating the facts relied upon to show the absence of jurisdiction. The plaintiff could set the plea down for argument upon its legal sufficiency; and if upon argument the plea is held sufficient, or if the plaintiff's counsel without argument is satisfied that it is sufficient in law if true in fact, could take issue upon it by filing the general replication. Upon the issue of fact thus joined, the parties would go to the proof and take depositions, or the court in its discretion could allow the testimony to be taken orally in open court⁴ and reduced to writing.⁵ By this procedure the issues of fact would be stated upon the record by the pleadings of the parties, who would have notice of the facts upon which the evidence is to be adduced; the proofs would be placed upon the record, and a full and complete record of the inquiry in regard to the jurisdiction would be pre-

¹ *Imperial Refining Co. v. Wyman*, 38 Fed. R. 574.

² *Wetmore v. Rymer*, 169 U. S. 115, 128.

³ *Hartog v. Memory*, 116 U. S. 588.

⁴ Equity Rule 67.

⁵ *Blease v. Garlington*, 92 U. S. 1.

sented to the supreme court upon appeal, and that court enabled to review the facts and the evidence upon which it bases its decree.¹

§ 251. Same — Discretion of the circuit courts is judicial and subject to review.—The statute confers a beneficial authority upon the circuit courts to be wisely executed in defeating collusive and fraudulent experiments upon their jurisdiction; but the discretion it confers is judicial, proceeding upon ascertained facts according to the fixed rules of law. In the order of dismissal for want of jurisdiction, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proved and controlled by fixed rules of law. The judge upon the hearing of a cause might receive impressions amounting to a moral certainty that such cause does not really and substantially involve a dispute or controversy within the jurisdiction of the court; but upon such a personal conviction, however strong, the court would not be at liberty to act, unless the facts upon which the conviction is based, when made distinctly to appear upon the record, create a legal certainty of the conclusion based upon them. The court directing the inquiry must cause the facts to be made to distinctly appear upon the record, and its order must be based upon such facts; and in order to give effect to the intention of congress, the action of the court must take a form that will enable the supreme court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before it.²

§ 252. Burden of proof upon the issue of jurisdiction.—When the plaintiff in his bill avers the jurisdictional facts in conformity to the constitution and laws of the United States, the jurisdiction must be taken as *prima facie* existing; and if the defendant desires to object to the jurisdiction, the burden is upon him to both allege and prove the facts which are relied upon to defeat the jurisdiction;³ and, under the act of 1875, the

¹ Wetmore v. Rymer, 169 U. S. 115, 128.

² Wetmore v. Rymer, 169 U. S. 115, 128; Depurton v. Young, 134 U. S. 241, 260; Barry v. Edmunds, 116 U. S. 550, 566.

³ Sheppard v. Graves, 14 How. 505, 517; Foster v. Cleveland, C., C. & St. L. Ry. Co., 56 Fed. R. 434; National Masonic Acc. Ass'n v. Sparks, 83 Fed. R. 225.

defendant must show by proof to "a legal certainty" that the suit does not really and substantially involve a dispute or controversy within the jurisdiction of the court.¹

§ 253. Presumptions in favor of the jurisdiction of courts. The superior courts of common law and equity in England, and the courts of like character of the different states of the American Union, are courts of general jurisdiction, and no case is presumed or intended to be out of the jurisdiction of those courts which is not shown to be so; they are presumed to have jurisdiction unless the contrary appears.² No such presumption, however, exists in favor of the jurisdiction of the courts of the United States; on the contrary, every case is presumed to be without their jurisdiction unless the contrary affirmatively appears from the record;³ but when the jurisdictional facts are made to affirmatively appear upon the record the jurisdiction must be taken as *prima facie* existing.⁴

§ 254. Plea in abatement — Definition.— A plea in abatement is one which, by proper averments of fact, either negative or affirmative, or both, as the circumstances of the case may require, discloses some objection to the suit or some defect or irregularity in it, arising either (1) out of the character and situation of the parties before the court and their relation to the subject of the suit, or (2) out of the insufficiency of the bill as framed to answer the purposes of complete justice, or (3) out of matters which show that the suit is unnecessary or oppressive; and by reason of which objection, or defect, or irregularity, the bill ought to be delayed or dismissed without a judicial determination of the rights claimed or involved in the suit. This plea does not deny the jurisdiction of the court nor dispute the validity of the rights which are the subject of the

¹ Barry v. Edmunds, 116 U. S. 550, 566; Depurton v. Young, 134 U. S. 241; Wetmore v. Rymer, 169 U. S. 115, 128. 252, 263; Tennessee v. Union & P. Bank, 125 U. S. 454; Continental Life Ins. Co. v. Rhoads, 119 U. S. 237; Scott v. Sandford, 19 How. 393.

² Redesdale (6th Am. ed.), 262, 263; Beames' Pleas in Equity, 91, 92; Scott v. Sandford, 19 How. 393. ⁴ Sheppard v. Graves, 14 How. 505, 512; Foster v. Cleveland, C., C. & St. L. Ry. Co., 56 Fed. R. 434; National Masonic Acc. Ass'n v. Sparks, 83 Fed. R. 225.

³ Fishback v. Western Union Tel. Co., 161 U. S. 96; Ex parte Smith, 94 U. S. 455; Metcalf v. Watertown, 128 U. S. 586; Bors v. Preston, 111 U. S.

suit; it does not go to the merits of the controversy, but shows that the suit is defective, or unnecessary or vexatious.¹ If the defendant intends to take advantage of any matter in abatement, he must do so by a plea in abatement, and before pleading to the merits, and his omission to do so is a waiver of the objection; such an objection cannot be availed of in a general answer to the merits.²

§ 255. Classification of pleas in abatement.—Pleas in abatement are classified as follows: 1. Pleas to the person of the plaintiff. 2. Pleas to the person of the defendant. 3. Pleas to the bill.³ These are each subject to further classification.

§ 256. Classification of pleas to the person of the plaintiff. Pleas in abatement to the person of the plaintiff are: 1. That the plaintiff on account of some legal disability cannot sue alone, as (1) infancy, (2) lunacy or idiocy, (3) coverture. 2. Bankruptcy. 3. That the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, as (1) that he is not administrator or executor, (2) that he is not heir, (3) that he is not a partner,⁴ (4) that the plaintiff suing as a corporation is not a corporation.⁵

§ 257. Classification of pleas to the person of the defendant.—Pleas in abatement to the person of the defendant are: 1. That the defendant does not sustain the character in which he is sued, as that defendant is not (1) executor or administrator, (2) nor heir, (3) nor a *feme sole*, (4) nor a *feme covert*.⁶

¹ Beames' Pleas in Equity, 102-162; 2 Daniell, 143-151; Story's Eq. Pl., secs. 722-747; Redesdale (6th Am. ed.), 268-271, 275, 276, 287-292, 324-327.

² Society v. Pawlet, 4 Pet. 480; Conard v. Atlantic Ins. Co., 1 Pet. 450; Metcalf v. Williams, 104 U. S. 93; Barry v. Foyles, 1 Pet. 311; Gilman v. Rives, 10 Pet. 298; Northwestern Union Packet Co. v. Clough, 20 Wall. 528; Chirac v. Reinicker, 11 Wheat. 280; Childress v. Emory, 8 Wheat. 642; Kane v. Paul, 14 Pet. 33; McKenna v. Fisk, 1 How. 241.

³ Redesdale (6th Am. ed.), 258, 260; Beames' Pleas in Equity, 118-162; 2 Daniell, 141-151; Story's Eq. Pl., secs. 722, 735.

⁴ Beames' Pleas in Equity, 118-132; Redesdale (6th Am. ed.), 258, 268-271; Story's Eq. Pl., sec. 722; 2 Daniell, 141, 142.

⁵ Society v. Pawlet, 4 Pet. 480; Conard v. Atlantic Ins. Co., 1 Pet. 450.

⁶ Beames' Pleas in Equity, 132-152; Redesdale (6th Am. ed.), 258, 275; 2 Daniell, 142, 143; Story's Eq. Pl., sec. 732.

§ 258. **Classification of pleas to the bill.**—Pleas in abatement to the bill are: 1. Another suit pending. 2. Want of parties. 3. Unnecessary multiplication of suits. 4. That the bill confounds distinct matters, or is multifarious.¹

§ 259. **Plea that plaintiff does not possess the character in which he sues.**—If the plaintiff sue as executor or administrator, and it appears from the face of the bill that his letters were granted in a state other than that in which he sues, or appears that for any reason he is not entitled to sue in that character, the defendant may demur;² but if the plaintiff, by the averments in his bill, shows that he has the title to sue as executor or administrator, and the defendant desires to controvert the truth of such averments, he should do so by plea in abatement.³ A plea which alleges that the plaintiff is not the person he pretends to be, or does not really sustain the character he assumes, is a good plea;⁴ and where the plaintiff sued as administrator, the defendant pleaded that he was not administrator, and the court allowed the plea, holding that it was a good plea in abatement.⁵

§ 260. **Plea that defendant does not sustain the character in which he is sued.**—A defendant may plead in abatement that he is not the person or does not sustain the character he is alleged to bear and in which he is sued, as that plaintiff is not executor, or administrator, or heir, or *feme sole*, or *feme covert*, having been sued in such capacity.⁶

§ 261. **Plea of bankruptcy.**—It is provided by the seventieth section of the bankruptcy act that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested

¹ Redesdale (6th Am. ed.), 260, 324-327; Beames' Pleas in Equity, 152-162; Story's Eq. Pl., secs. 735-747.

² Black v. Allen Co., 42 Fed. R. 623, 624, 625; Redesdale (6th Am. ed.), 180, 181; 1 Daniell, 416, 417.

³ Childress v. Emory, 8 Wheat. 642; Kane v. Paul, 14 Pet. 33; Carter v. Treadwell, 3 Story, 42, 50, Fed. Cas. No. 2,480.

⁴ Green v. Hayman, 2 Ch. Cas. 10; Knight v. Bee, 3 Ch. R. 40; Coke v. Bishop, Finch's R. 230.

⁵ Winn v. Fletcher, 1 Vern. 473.

⁶ Griffith v. Bateman, Finch's R. 334; Redesdale (6th Am. ed.), 275; Beames' Pleas in Equity, 132, 133; Cooper's Eq. Pl. 250.

by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt, to all his property except that which is exempt from his debts;¹ and if an adjudicated bankrupt should file a bill in equity touching his property so vested by operation of law in the trustee, and the objection does not appear in the bill, his bankruptcy may be pleaded in abatement of the suit.² In such a plea it is not sufficient to say that the defendant has been duly adjudicated a bankrupt, but the plea should state all the facts successively and distinctly upon which the bankruptcy is made to rest. A plea under the existing bankruptcy act should allege the following facts, viz.: (1) The acts of bankruptcy committed by the bankrupt; (2) the filing of the petition in bankruptcy, and whether filed by the bankrupt or his creditors; (3) the nature of the debt or debts upon which the proceedings in bankruptcy were based, showing whether they are debts from which the bankrupt may be released; (4) the proceedings had and taken in the court of bankruptcy upon the petition; (5) the adjudication of bankruptcy; (6) the appointment and qualification of the trustee; and (7) that the property concerning which the bill is filed is such as passes to the trustee under the bankruptcy act.³

§ 262. **Plea of another suit pending.**—Another suit pending in the same or another court of equity between the same parties for the same cause of action and seeking the same relief may be pleaded in abatement to a bill in equity.⁴ “This plea corresponds with the *exceptio litis pendentis*, and is analogous to the plea of the common law that there is another action depending,” by which latter system of pleading the general rule is “that whenever it appears that the plaintiff has sued out two writs against the same defendant for the same thing, the first

¹ 30 U. S. Stat. at L., ch. 541, sec. 70, p. 544.

² Spraggs v. Binks, 5 Ves. 583; Benfield v. Solomon, 9 Ves. 77; Bowser v. Hughes, 1 Anst. 101; Fawkes v. Pratt, 1 P. Wms. 592; Joseph v. Tuckey, 2 Cox, 44; Kirkman v. Andrews, 4 Beav. 554; Beames' Pleas in Equity, 121; Redesdale (6th Am. ed.), 273.

³ Carleton v. Leighton, 3 Meriv. 667; Beames' Pleas in Equity, 122; 1 Daniell, 77, 78; 30 U. S. Stat. at L., ch. 541, p. 544.

⁴ Redesdale (6th Am. ed.), 287; Beames' Pleas in Equity, 132; 2 Daniell, 144, 145; Insurance Co. v. Brune, 96 U. S. 588, 593; Memphis City v. Dean, 8 Wall. 64.

not being determined, the second writ shall abate, for the law abhors multiplicity of actions." The plea at law that there is another action depending is a plea in abatement to the action of the writ; and as it does not attempt to deny the existence of the right made the subject of the suit, nor contend that it is vested in the defendant, it is also in equity a plea in abatement, and not in bar of the bill.¹ When the pendency of one suit is set up to defeat another the cases must be the same. There must be the same parties, or, at least, such as represent the same interest; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that, if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.² It is not true that a court, having obtained jurisdiction of a subject-matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring a decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, the court must have regard to the nature of the remedies, the character of the relief sought, the facts on which the claim for relief is founded, and the identity of the parties in the different suits. A party having notes secured by a mortgage on real estate may, unless restrained by statute, sue in a court of equity to foreclose his mortgage, and in a court of law to recover judgment on his notes, and in another court of law in an action of ejectment for possession of the land; in all the suits the only question at issue may be the existence of the debt secured by the mortgage; but as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the others.³ At law, and the rule is the same in equity, the pendency of a former action between the same parties for the same cause is pleadable in abatement because the latter is regarded as vexatious; but the former

¹ Beames' Pleas in Equity, 137-140.

³ Buck v. Colbath, 3 Wall. 334.

² Watson v. Jones, 13 Wall. 679, 738.

action must be in a domestic court; that is, in a court of the same state in which the second action has been brought.¹ A plea of a suit pending in a court of chancery of Ireland was overruled in the English court of chancery.² The pendency of a prior suit in another jurisdiction cannot be pleaded in abatement to a subsequent suit in a circuit court of the United States.³ A state court of general jurisdiction is not a foreign court in its relation to a circuit court of the United States sitting in the same state; and a suit pending in a state court may be pleaded in abatement of a suit subsequently brought in a United States circuit court sitting in the same state, between the same parties, upon the same cause of action, for the same relief, founded upon the same facts; for the reason that, by the provisions of the judiciary act, the jurisdiction of the circuit courts of the United States in all suits of a civil nature at common law or in equity is concurrent with the courts of the several states, and there is no principle better settled than that, where two or more tribunals have concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action between the same parties for the same cause, seeking the same relief, subsequently instituted in either of the other tribunals.⁴ When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted.⁵ The rule that the pendency of an action in a foreign jurisdiction cannot be pleaded in abatement does not apply when plaintiff has secured his debt by the attachment of property sufficient to satisfy the claim in a foreign jurisdiction.⁶

¹ *Mutual Life Ins. Co. v. Harris*, 96 U. S. 588, 593; *Hatch v. Spofford*, 22 Conn. 485.

² *Dillon v. Alvares*, 4 Ves. 357.

³ *Stanton v. Embry*, 93 U. S. 584, 588.

⁴ *Earl v. Raymond*, 4 McLean, 233, Fed. Cas. No. 4,243; *Nelson v. Foster*, 5 Biss. 44, Fed. Cas. No. 10,105; *Bradford v. Fulsom*, 14 Fed. R. 97; *Shelby v. Bacon*, 10 How. 56.

⁵ *Harkrader v. Wadley*, 172 U. S. 148, 170; *Peck v. James*, 7 How. 612; *Freeman v. Howe*, 24 How. 450; *Moran v. Sturges*, 154 U. S. 256; *Central Nat. Bank v. Stevens*, 169 U. S. 432; *Farmers' Loan & Trust Co. v. Lake Street Elev. Co.*, L. Rep. Ann. Oct. Term, 1899, No. 11,565.

⁶ *Lawrence v. Remington*, 6 Biss. 44, Fed. Cas. No. 814; *Embre v. Hamed*, 5 Johns. 101.

§ 263. Reason for the rule that suit pending is pleadable in abatement of a second suit.—The reason for the rule that the pendency of a former suit may be pleaded in abatement of a second action is that, if the plaintiff has already an action pending in which he can obtain full relief, there is no justification for harassing the defendant by a second action for the same subject-matter. If it should appear, however, that in the second action the plaintiff can avail himself of some legal or equitable advantage not open to him in the first action, then a legal reason is shown for the bringing of the second action, and the pendency of the one would not ordinarily abate the other. This is the reason why, as a rule, the pendency of an action at law cannot be successfully pleaded in abatement of a suit in equity.¹ The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at the common law, good cause of abatement. It is so because there cannot be any reason or necessity for bringing the second; and therefore it must be oppressive and vexatious. But while the law is thus careful to screen the defendant from oppression and vexation, it is equally impartial and open to the plaintiff, and even indulgent to him, a creditor, to seek redress, by pursuing several remedies at the same time, if this is found to be reasonable and necessary. The law will not countenance vexation and oppression, neither will it prevent a creditor from using, in a fair manner, the means in his power to collect his debts. This rule is not a rule of unbending rigor, nor of universal application, nor a principle of absolute law; it is rather a rule of justice and equity, generally applicable, and always where the two suits are virtually alike and in the same jurisdiction. In applying the rule it should be kept steadily in mind that a plea in abatement, being a dilatory plea, is not like a plea of payment or satisfaction, or of some other matter in bar of the merits of the claim, which would find more favor; but its object is to cause postponement and delay, and the language of the plea is that the second suit is unnecessary and vexatious, and should be abated. A second suit is not, of course, to be abated and dismissed as vexatious, but all the attending circumstances are to be first carefully considered, and the true inquiry will be whether or not the aim of the plaintiff

¹ *Bradford v. Fulsom*, 14 Fed. R. 97, 100.

is fair and just, or oppressive and vexatious. If the plaintiff, by a second suit, can place his claim in a more favorable condition for obtaining redress, he should be permitted to do it.¹

§ 264. *Requisites of a plea of lis pendens.*—The plea should aver with certainty when the suit was instituted, the purposes of the bill and the relief sought by it, and that it is still pending,² and that the present and the former suit are for the same matter;³ and that in the former suit the same issue was joined, the subject-matter was the same, and the proceedings were taken for the same purpose as in the second suit;⁴ and it must be averred that the defendant in the first suit has been served with process or has appeared or answered, for otherwise there would be no suit pending.⁵ In the circuit courts of the United States it is directed by rule that no process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office,⁶ and upon the return of the subpoena served and executed upon any defendant the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry;⁷ and the English rule is that the writ of subpoena must be issued and served upon all the defendants before a cause can be properly said to be commenced.⁸ The plea should also show that the first suit is pending in a court of competent jurisdiction, and that the result of the proceedings therein will be conclusive so as to bind every other court.⁹ If the second suit embraces more as to parties and subject-matter the plea of *lis pendens* will be overruled.¹⁰ A plea which fails to show when the first suit was commenced and whether issue was joined was held insufficient in form and substance.¹¹ Where a bill was filed by a single creditor in behalf of himself against the executors of a deceased person and the devisee of his real estate, upon which bill a decree was made, and another creditor came in and took the benefit of the decree and proved

¹ Hatch v. Spofford, 22 Conn. 494.

² Foster v. Vassall, 3 Atk. 588, 590.

³ Devil v. Browlow, 2 Dick. 611.

⁴ Behrens v. Sieveking, 2 Myl. & Cr. 602.

⁵ Moore v. Welsh Copper Co., 1 Eq. Cas. Abr. 39.

⁶ Equity Rule 9.

⁷ Equity Rule 16.

⁸ 1 Daniell, 554.

⁹ Behrens v. Sieveking, 2 Myl. & Cr. 602.

¹⁰ Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co., 13 Fed. R. 857.

¹¹ Crescent City Co. v. Butchers' Union, 12 Fed. R. 225.

his debt, and then filed a bill on behalf of himself and other creditors against the executor and the devisee, and also made the heir at law a party defendant, who was not a party to the other suit, the lord chancellor held that the plaintiff in the second suit, by taking the benefit of the decree and proving his debt in the former suit, became *quasi* a party to that suit, and, as he did not show by his bill that it was absolutely necessary to bring the heir at law before the court, a plea of the pendency of the former suit should be allowed.¹

§ 265. Procedure when plaintiff sues both at law and in equity.—The ancient rule was that “a suitor might bring an action at law against the representatives of a deceased person, and at the same time file a bill” in chancery “for the discovery of assets;”² but by Lord Clarendon’s orders it was directed, in substance, that if, after suit commenced at the common law, a bill should be exhibited in chancery for the same matter, the pendency of a former suit shall be a good plea;³ but Lord Clarendon’s order became obsolete, and the more ancient order of Lord Bacon was followed, under which it was “the practice for the defendant not to plead the pendency of such suit at common law, but, after he had put in his answer, to apply to the court, that the plaintiff may make his election whether he will proceed at law or in equity, and the court will order accordingly.”⁴ “If the plaintiff shall elect,” says Lord Redesdale, “to proceed in equity, the court will restrain his proceeding at law by injunction, and if he shall elect to proceed at law the bill will be dismissed. But if he should fail at law, the dismissal of his bill will be no bar to his bringing a new bill.”⁵ In the *Forum Romanum* it is said: “The defendant cannot plead a suit depending at law in bar of the plaintiff’s demand in equity, because the plaintiff has a right to the defendant’s oath in equity, to exonerate him of the *onus probandi* at law; but, after the answer is come in, the defendant may put the plaintiff to his election to proceed at law or in equity, that he may not be doubly vexed.”⁶ It would seem that the plaintiff cannot be put to his election except in

¹ *Neve v. Weston*, 3 Atk. 557.

² *Beames’ Pleas in Equity*, 150.

³ *Beames’ Pleas in Equity*, 147.

⁴ *Beames’ Pleas in Equity*, 151.

⁵ *Redesdale* (6th Am. ed.), 291, 292.

⁶ *For. Rom.* (Tyler’s ed.) 55.

cases where the courts of common law and equity have concurrent jurisdiction.¹

§ 266. Plea of want of parties.—Where the bill is defective for want of parties, and the defect does not appear upon the face of the bill, it may be shown by plea. In such a plea it is not always necessary to point out the persons who should be made parties by name; it will be sufficient if the plea points out who the individuals are, by some description which enables the plaintiff to identify them and make them parties; but the names, if known to the defendant, should be stated in the plea.² If the bill shows a sufficient reason for not making such persons parties, the court may, in its discretion, proceed in the cause without making them parties, in which case the decree shall be without prejudice to the absent parties;³ but the plea may controvert the facts averred in the bill to excuse the failure to bring in the absent parties.⁴ But if it is impossible for the court to make a decree without the presence of the absent parties, nothing can excuse their omission.⁵ Upon the argument of such a plea, the court, instead of allowing it, may allow the bill to stand over and give the plaintiff leave to amend his bill by making new parties,⁶ or such leave may be given after allowing the plea.⁷ Under the present practice, a plea of want of parties is not strictly necessary; the defendant may by his answer suggest a defect of parties, and may set the cause down for hearing upon that objection within fourteen days after answer filed.⁸ Where the bill is dismissed for want of parties, it should be without prejudice.⁹

§ 267. Pleas in bar — Definition.—Whatever shows that there is no right which can be made the subject of suit, or whatever is a complete perpetual bar to the right sued for, may constitute the subject of a plea in bar; or whatever destroys the

¹ *Hunt v. Danford*, Fed. Cas. No. 6,888; *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,673.

² *Attorney-General v. Jackson*, 11 Ves. Jr. 365, 370.

³ Equity Rule 47.

⁴ *Redesdale* (6th Am. ed.), 326.

⁵ *Shields v. Barrow*, 17 How. 130; *Coiron v. Millaudon*, 19 How. 113.

⁶ *Redesdale* (6th Am. ed.), 326; *Miligan v. Milledge*, 3 Cranch, 220.

⁷ *Redesdale* (6th Am. ed.), 326, 327; Equity Rule 35.

⁸ Equity Rule 52; *United States v. Gillespie*, 6 Fed. R. 803.

⁹ *Housé v. Mullen*, 22 Wall. 42; *Kendig v. Dean*, 97 U. S. 423.

plaintiff's suit, and disables him forever from recovering, may be pleaded in bar. But this must be understood as applicable to matter constituting one point, or ground of defense, proper for a plea. In equity pleading there is no such plea known as the general issue, or a general denial. The plea in bar known at law under the title of the general issue is altogether unknown in equity, where pleas in bar are in the nature of special pleas in bar at law, and will in most instances be found strongly analogous to them.¹

§ 268. General classification of pleas in bar.—Pleas in bar may be classed under the following general heads: 1. Pleas of statutes. 2. Pleas of matter of record. 3. Pleas of matter *in pais*.² 4. Negative pleas, which deny some main fact averred in the bill, the truth of which is necessary to sustain the suit.³ 5. Pleas of estoppel. This classification is subject to further and subordinate classification.

§ 269. Classification of pleas of statutes.—Pleas of statutes may be classified as follows: 1. Plea of the statute of limitations. 2. Plea of the statute of frauds. 3. Plea of any other public statute which destroys the demand of the plaintiff. 4. Plea of any private or particular statute.⁴

§ 270. Classification of pleas of matter of record.—Pleas of matter of record may be classified as follows: 1. Plea of a decree in equity, by which the rights of the parties have been determined. 2. Plea of a decree in equity, dismissing another bill for the same cause after a hearing upon the merits. 3. Plea of a verdict and judgment at law. 4. Plea of a judgment or sentence of a court of probate or some other domestic court. 5. Plea of a judgment of a foreign court.⁵

§ 271. Classification of pleas of matter in pais.—Pleas of matter *in pais* may be classified as follows: 1. Plea of a re-

¹ Beames' Pleas in Equity, 163, 164. This definition of a plea in bar is taken almost literally from Beames.

² Beames' Pleas in Equity, 164; Cooper's Eq. Pl. 251.

³ 2 Daniell, 115; Adams' Equity, 337; Rhino v. Emery, 79 Fed. R. 433.

⁴ Redesdale (6th Am. ed.), 309, 312, 318; Beames' Pleas in Equity, 164-189; Cooper's Eq. Pl. 251-259.

⁵ Redesdale (6th Am. ed.), 278-287; Beames' Pleas in Equity, 202-225; Cooper's Eq. Pl. 266-272; 2 Daniell,

179.

lease. 2. Plea of a stated account. 3. Plea of a settled account. 4. Plea of an award. 5. Plea of a purchaser for a valuable consideration without notice of plaintiff's title. 6. Plea of title in defendant, founded upon (1) a will, (2) a conveyance or other instrument, (3) long, peaceable and adverse possession.¹

§ 272. **Classification of negative pleas.**—Negative pleas in bar may be classified as follows: 1. Plea denying the existence of a partnership.² 2. Plea denying the existence of a debt.³ 3. Plea denying the existence or execution of a mortgage or other instrument.⁴ 4. Plea denying plaintiff's title.⁵

§ 273. **Plea of the statute of limitations.**—"The statute of limitations is a good plea in bar to the relief sought by a bill in equity, as it is a good special plea in bar to an action at law."⁶ Courts of equity sometimes act in obedience to the statute, and sometimes they apply it by way of analogy; where the cause of action is legal and the statute has barred the remedy at law, the defense is as complete in equity as it is at law; but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity, the statute is not necessarily applied.⁷ Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law.⁸ The right to plead the statute

¹ Beames' Pleas in Equity, 225, 226; Cooper's Eq. Pl. 276-289; Redesdale (6th Am. ed.), 301-308.

² Drew v. Drew, 2 Ves. & B. 159; Sanders v. King, 6 Madd. 61; Harris v. Harris, 3 Hare, 450; Mansell v. Feeney, 2 John. & Hem. 313.

³ Thring v. Edgar, 2 Sim. & St. 280.

⁴ Chamberlain v. Agar, 2 Ves. & B. 289; Armitage v. Wadsworth, 1 Madd. 189; Hilchens v. Lander, Cooper's R. 34.

⁵ Gun v. Prior, 2 Dick. 657; Newman v. Wallis, 2 Bro. C. C. 143; Kennessley v. Simpson, Forrest, 85; Emerson v. Harland, 3 Sim. 490.

⁶ Beames' Pleas in Equity, 165, 166, citing Low v. Burron, 3 P. Wms. 262; Prince v. Heylin, 1 Atk. 493; Aggas v. Pickerell, 3 Atk. 225; Wych v. E.

India Co., 3 P. Wms. 309; Wright v. Carew, Nels. 157; Saunders v. Hord, 1 Rep. Ch. 97; Lacon v. Lacon, 2 Atk. 395; Calpham v. Boyer, 1 Ch. R. 110; Lacon v. Briggs, 3 Atk. 105; Dupleix v. De Roven, 2 Vern. 540; Davis v. Dee, Finch's R. 243; Lotchwell v. Foster, Finch's R. 266; Rumney v. Mead, Finch's R. 303; Finchman v. Hobbs, Finch's R. 370; Hurdit v. Calladon, 1 Ch. R. 114; Bayley v. Adams, 6 Ves. 586; For. Rom. 61; and other authorities.

⁷ Riddle v. Whitehall, 135 U. S. 621, 640; Kane v. Bloodgood, 7 Johns. Ch. 106.

⁸ Baker v. Cummings, 169 U. S. 189; Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 448.

of limitations has been always held to be a personal privilege, of which the debtor could avail himself or not, as he might choose.¹ In a plea of the statute of limitations interposed to a bill in equity, it is not necessary for the plea to state in express terms that the defendant relies upon the statute creating the bar; but if the defendant in his plea states facts necessary to bring the case within the statute, and then insists on such facts as a bar, that will be sufficient; and the court is bound to take judicial notice of the statute, when the facts stated and relied on as a bar are sufficient to bring the case within its operation.²

§ 274. Necessary averments of a plea of the statute of limitations.—A plea of the statute of limitations should aver with certainty and precision all the facts necessary to bring the case within the operation of the particular statute relied upon to create the bar to the suit;³ and it must contain averments necessary to avoid any equity set up in the bill against the bar created by the statute.⁴ Where fraud, or concealment, or a new promise, or any other matter whatever, is charged in the bill by which the bar created by the statute may be avoided, the plaintiff must deny such charges by averment in the plea and by an answer in support of the plea; and the answer in support of the plea (and which is indispensable to its support) must be full and clear and contain a particular and precise denial of the charges, or it will not be effectual to support the plea, and it will be overruled upon argument.⁵ The plea must in itself, if true, contain a complete bar. It should not be a naked plea of the statute of limitations, but should contain averments negating the special matter set up in the bill which, if true, would avoid the operation of the statute; and the answer in support of the plea should also contain a full discovery of the matters

¹ *Sanger v. Nightingale*, 122 U. S. 176, 188.

² *Harpending v. Reformed Dutch Church*, 16 Pet. 455, 486; *Bogardus v. Trinity Church*, 4 Paige Ch. 178; *Van Hook v. Whitlock*, 7 Paige Ch. 373, 381.

³ *Beames' Pleas in Equity*, 188; *Van Hook v. Whitlock*, 7 Paige Ch. 373;

Bogardus v. Trinity Church, 4 Paige Ch. 178.

⁴ *Beames' Pleas in Equity*, 188; *Goodrich v. Pendleton*, 3 Johns. Ch. 384.

⁵ *Goodrich v. Pendleton*, 3 Johns. Ch. 384, 391; *Cooper's Eq. Pl.* 251, 252; *Beames' Pleas in Equity*, 29, 168, 169; *Redesdale* (6th Am. ed.), 312-318.

so set up in avoidance of the bar. It is not sufficient for the answer alone to negative such matter, for it is mere matter of discovery; but the plea should in itself, if true, contain a complete bar.¹ It is essential to a plea of this kind that it should show that the cause of action did not accrue within the time limited by the statute relied upon to create the bar.²

§ 275. Plea of laches.—There is a defense peculiar to courts of equity, founded on lapse of time and staleness of the claim, where no statute of limitations governs the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.³ “A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.”⁴ Laches is a defense which may be made by demurrer, or by plea, or by answer, or presented by argument, either upon a preliminary or final hearing.⁵

§ 276. Plea of the statute of frauds.—It is provided by the original judiciary act: “That the laws of the several states, except where the constitution, treaties and statutes of the United States shall otherwise provide, shall be regarded as rules

¹ *Stearns v. Page*, 1 Story, 204, Fed. Cas. No. 13,339.

² *Cooper's Eq. Pl.* 252.

³ *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Wilson v. Matthews*, 3 Pet. 44; *Miller v. McIntire*, 6 Pet. 61; *Piatt v. Vattier*, 9 Pet. 412, 417; *McKnight v. Taylor*, 1 How. 161; *Brown v. Wathen*, 1 How. 189; *Wagner v. Baird*, 7 How. 234; *United States v. Moore*, 12 How.

209; *Badger v. Badger*, 2 Wall. 87; *Godden v. Kimmell*, 99 U. S. 201.

⁴ *Lord Camden in Smith v. Clay*, 3 Brown's Ch. 640.

⁵ *Woodmanse & Hewitt Co. v. Williams*, 37 U. S. App. 109; *Maxwell v. Kennedy*, 8 How. 210, 222; *McLaughlin v. People's Ry. Co.*, 21 Fed. R. 574; *Hinchman v. Kelley*, 54 Fed. R. 63.

of decision in trials at common law in the courts of the United States where they apply;”¹ and it has been uniformly held by the United States supreme court that, under the above provision, the statutes of frauds of the several states are binding upon the federal courts as rules of decision,² even as applied to commercial instruments;³ and it has been also held that the statutes of frauds of the several states, requiring contracts for the sale or exchange of land to be in writing, are as binding upon the courts of the United States in suits in equity as in actions at law.⁴ It therefore follows that, in any suit in equity in a circuit court of the United States, the statute of frauds of the state in which the court sits may, if applicable to the case, be pleaded by the defendant in bar of the bill; but the plea must contain an averment of the facts necessary to bring the case within the particular provision of the act relied upon to defeat the suit; and if the bill contains any averments or charges which may avoid the bar created by the statute, and take the case out of its operation, such averments and charges must be denied by the plea, and also by an answer in support of the plea.⁵ It is essential to a plea of the statute of frauds that it should aver that the agreement was not reduced to writing and signed by the party to be charged.⁶ If the bill charges collateral circumstances as evidence of an agreement in writing, a plea of the statute will not be sufficient, unless it contain averments denying such collateral circumstances.⁷ “It seems that a plea of this statute will be equally available where a written agreement has been essentially varied by parol.”⁸

§ 277. Plea of any other statute.—Any other public statute which destroys the demand of the plaintiff, or creates a bar to his suit, may be pleaded in bar of the bill; but it must contain averments necessary to bring the case of the defendant within

¹ 1 U. S. Stat. at L., ch. 20, secs. 34, 92; U. S. R. S., sec. 721.

² *Osterman v. Baldwin*, 6 Wall. 116, 124; *Violett v. Patton*, 5 Cranch, 142; *Grafton v. Cumming*, 99 U. S. 100; *Warner v. Texas & Pacific R. Co.*, 164 U. S. 418, 435.

³ *Moses v. Nat. Bank of Lawrence County*, 149 U. S. 298, 304; *Mandeville v. Riddle*, 1 Cranch, 290; s. c., 5 Cranch,

322; *Kirkman v. Hamilton*, 6 Pet. 20; *Brashear v. West*, 7 Pet. 608; *Paine v. Central Vt. R. Co.*, 118 U. S. 152, 161.

⁴ *Purcell v. Coleman*, 4 Wall. 513, 517.

⁵ *Cooper's Eq. Pl.* 255, 256.

⁶ *Beames' Pleas in Equity*, 177.

⁷ *Evans v. Harris*, 2 Ves. & B. 361.

⁸ *Beames' Pleas in Equity*, 177.

the terms and provisions of the statute relied upon, and to avoid any equity set up in the bill against the bar created by the statute.¹

§ 278. Plea of a decree in equity, or of a verdict and judgment at law.—If the rights of the parties or their privies in the subject-matter of a bill have been fully determined by a previous adjudication, by a final decree in equity, such decree in equity may be pleaded by the defendant in bar of the new bill;² and a defendant may plead in bar of the bill a verdict and judgment at law, where such judgment has determined the rights of the parties or their privies in the matter of the bill.³ As a plea of former adjudication, there is no difference between a verdict and judgment in a court of law, and a decree of a court of equity; they both stand on the same footing, and may be offered in evidence under the same limitations.⁴ A decree in equity, to be a bar to another suit, must be in its nature final, and must be upon the merits.⁵ A decree or order dismissing a former bill between the same parties or their privies for the same matter is a final determination, and may be pleaded in bar of a new bill, unless the dismissal is made because of some defect in the pleadings, or for want of jurisdiction, or because the plaintiff has an adequate remedy at law, or unless the dis-

¹ Redesdale (6th Am. ed.), 318; Cooper's Eq. Pl. 258; Beames' Pleas in Equity, 188.

² Lyon v. Perin & Goff Mfg. Co., 125 U. S. 698, 670; Green v. Bogue, 158 U. S. 478, 504; Durant v. Essex Co., 7 Wall. 107, 113; Walden v. Bodley, 14 Pet. 156; Hughes v. United States, 4 Wall. 237; Rutland v. Brett, Finch's R. 124; Child v. Gibson, 2 Atk. 603; Bell v. Read, 3 Atk. 590; Gregory v. Molesworth, 3 Atk. 626; Wortley v. Birkhead, 4 Atk. 809; Mollock v. Galton, 1 Dick. 65; Senhouse v. Earl, 2 Ves. 450; Kinsey v. Kinsey, 2 Ves. 577; Taylor v. Sharp, 3 P. Wms. 371; Redesdale (6th Am. ed.), 278; Cooper's Eq. Pl. 269; Beames' Pl. in Eq. 211; 2 Daniell, 175, 176, 177, 178; Thompson v. Roberts, 24 How. 233.

³ Hughes v. Blake, 6 Wheat. 456; s. c., 1 Mason, 575, Fed. Cas. No. 6,845; Sidney v. Perry, 1 Bro. C. C. 305; Bluck v. Elliott, Finch's R. 13; Pitt v. Hill, Finch's R. 70; Hellam v. Graves, Finch's R. 205; Cornell v. Warren, Finch's R. 239; Temple v. Baltinglass, Finch's R. 275; Rawlings v. Rawlings, 3 Ch. R. 30; Sewell v. Freeston, 1 Ch. Cas. 65; Beames' Pl. in Eq. 202; Thompson v. Roberts, 24 How. 233; Morgan v. Beloit, 7 Wall. 613.

⁴ Hopkins v. Lee, 6 Wheat. 110; Smith v. Kernochen, 7 How. 198; Thompson v. Roberts, 24 How. 233.

⁵ Redesdale (6th Am. ed.), 278, 279; Durant v. Essex Co., 7 Wall. 107, 113; Walden v. Bodley, 14 Pet. 156; Hughes v. United States, 4 Wall. 237.

missal is in terms without prejudice, or other terms indicating a right or privilege reserved by the court to the plaintiff to take further proceeding on the subject.¹ A dismissal for want of parties does not render the subject of the controversy *res adjudicata*, but leaves the merits unconsidered and undisposed of, and cannot be pleaded in bar of a new bill.² A verdict and judgment at law cannot be pleaded in bar of a bill in equity unless the judgment is absolutely final upon the rights of the parties or their privies in the matter of the bill.³ A judgment rendered upon demurrer is equally conclusive of the facts confessed by the demurrer, as a judgment rendered upon a verdict finding the same facts would be, since they are established in the former case as in the latter, by way of record; and facts thus established can never afterwards be contested between the same parties or those in privity with them. It makes no difference in principle whether the facts upon which the court proceeds to judgment were proved by deeds and witnesses, or whether they were admitted by the parties; and an admission by way of demurrer to a pleading, in which the facts are alleged, is just as available to the opposite party as if the admission had been made orally before the jury. And therefore a final judgment upon demurrer may be pleaded in bar of a bill between the same parties or their privies brought to establish the same right.⁴

§ 279. **The extent of a plea of *res judicata*.**—The cases in which the defense of a former adjudication may be interposed, in so far as the extent of the plea is concerned, or the quantity of the bill to which the defense may be applied, as shown by the decisions of the supreme court of the United States, may be classed and arranged under two heads, viz.: (1) Where the second suit between the same parties or their privies is based upon the same cause of action as in the first suit; in which class of cases, the plea is a full and complete defense, extend-

¹ *Durant v. Essex Co.*, 7 Wall. 107, 113; *Walden v. Bodley*, 14 Pet. 256; *U. S.* 423.

Hughes v. United States, 4 Wall. 237; *Redesdale* (6th Am. ed.), 279.

³ *Beames' Pl. in Eq.* 202–205.

² *St. Romes v. Levee Cotton Press Co.*, 127 U. S. 614, 621; *House v. Mul-*

len, 22 Wall. 42; *Kendig v. Dean*, 97 U. S. 225, 236; *Gould's Pl.*, ch. 14, part I, sec. 43.

ing to the whole bill.¹ (2) Where the second suit between the same parties or their privies is based upon a different cause of action, but where some right, question or fact put in issue in the second suit was distinctly put in issue and directly determined by the court as a ground of recovery in the first suit; in which class of cases, the defense is only partial, extending only to that part of the bill which sets up the right, question or fact put in issue and determined in the first suit.² In order to render a matter *res judicata* in cases of the first class, there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) identity in the cause of action; (3) identity of the persons and parties (or their privies) to the action; and (4) identity of the quality in the persons for or against whom the claim is made.³ In regard to the second class of cases, the general principle announced is: "That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."⁴ And, in this class of cases, "the estoppel resulting from the thing adjudicated does not depend upon whether there is the same demand in both cases, but exists even although there are different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."⁵ The supreme court of the United States has announced the following rule as to the application and extent of the defense of *res judicata* in both classes of cases above pointed out, viz.: "When the second suit is upon the same cause of action, and between the same parties or their privies, the judg-

¹ *Lyon v. Perin & Goff Mfg. Co.*, 125 U. S. 698, 702; *W. A. & G. Packet Co. v. Sickles*, 24 How. 333, 340; *Marine Ins. Co. v. Young*, 1 Cranch, 332.

² *Southern P. R. Co. v. United States*, 168 U. S. 1; *New Orleans v. Citizens' Bank*, 167 U. S. 371.

³ *Lyon v. Perin & Goff Mfg. Co.*, 125 U. S. 698, 702; *W. A. & G. Packet Co. v. Sickles*, 24 How. 333, 340.

⁴ *Southern P. R. Co. v. United States*, 168 U. S. 1.

⁵ *New Orleans v. Citizens' Bank*, 167 U. S. 371.

ment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but where the second suit is upon a different cause of action, though between the same parties or their privies, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined.”¹

§ 280. Requisites of a plea of *res judicata*.—A plea of decree in a former suit in equity concluding the matter of the second suit must set forth as much of the former bill and answer as is necessary to show that the same right, question or fact was then in issue and determined by the court; and if the second bill is filed to impeach the decree in the former suit for fraud or unfairness in obtaining it, or for any other cause whatever, all the averments, charges and equitable circumstances contained in the second bill and put forth for the purpose of avoiding the bar of the decree should be denied by the averments of the plea and by answer in support of it.² A plea of a verdict and judgment at law should show by proper averments that the demand of the plaintiff in the bill was put in issue, tried and determined in the action at law;³ and when the bill seeks to set aside such verdict and judgment at law as having been obtained by fraud or unfairness, or for any other cause, the defendant should plead the verdict and judgment in bar of the bill, and every averment, charge or equitable circumstance inserted in the bill for the purpose of avoiding the bar should be denied by the plea and also by an answer in support of it.⁴ Upon the trial of an issue of former adjudication, parol evidence is admissible to show what was put in issue and determined in the former suit.⁵

¹ *Nesbit v. Independent District of Riverside*, 144 U. S. 610, 621; *Cromwell v. Sac County*, 94 U. S. 351; *Wilmington & Weldon R. Co. v. Alsbrough*, 146 U. S. 279, 302; *Keokuk & W. R. Co. v. State of Wisconsin*, 152 U. S. 301, 317; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 130; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 696.

² *Redesdale* (8th Am. ed.), 279-286; *Cooper's Eq. Pl.* 271, 272; *Beames' Pleas in Equity*, 223.

³ *Williams v. Lee*, 3 Atk. 223.

⁴ *Hughes v. Blake*, 6 Wheat. 453; *s. c.*, 1 Mason, 515, *Fed. Cas. No. 6,845*; *Williams v. Lee*, 3 Atk. 223.

⁵ *Campbell v. Rankin*, 96 U. S. 261; *Miles v. Caldwell*, 2 Wall. 35; *Cromwell v. Sac County*, 94 U. S. 351; *W.*

§ 281. A plea of a release.—“If the plaintiff, or a person under whom he claims, has released the subject of his demand, the defendant may plead the release in bar of the bill. In a plea of a release, the defendant must set out the consideration upon which the release was made;” a full and distinct averment of the consideration is absolutely essential to the validity of the plea. A plea of release puts in issue two ultimate facts, viz.: (1) the execution of the release, and (2) the consideration upon which the release was made; and the truth of both of these facts is necessary to make the plea a good bar; but generally in cases where a release is pleaded, the sufficiency of the consideration to support the release, and the good faith of the transaction by which it was obtained, is the point chiefly litigated. And where fraud, coercion, misrepresentation or other circumstances are charged in the bill for the purpose of avoiding the bar of the release, the defendant pleading the release must, by proper negative averments in the plea, deny the allegations of fraud, and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill to avoid the bar of the release.¹ Inasmuch as a plea of release puts in issue the consideration upon which the release was made, and the sufficiency and fairness of the consideration constitute one of the main issues of fact to be tried and determined by the court at the hearing upon the proofs, it follows that a plea of release cannot protect the defendant against a full discovery as to all matters put in issue by the bill, as to the sufficiency and fairness of the consideration.² In the case last cited, the plaintiff, in her bill, stated various dealings between herself and defendant, covering a period of about eight years, imputing to defendant fraud and unfair dealing, and various usurious charges, overcharges and mistakes in accounts delivered; and prayed a discovery of the several transactions and a general accounting. To all the relief and discovery sought by the bill in regard to said trans-

A. & G. Packet Co. v. Sickles, 5 Pleas in Equity, 225-228; Roche v. Wall, 580; Davis v. Brown, 94 U. S. Morgell, 2 Sch. & Lef. Ir. Ch. R. 423; Russell v. Place, 94 U. S. 606; 721; Allen v. Randolph, 6 Johns. Ch. W. A. & G. Packet Co. v. Sickles, 24 693; Bolton v. Gardner, 3 Paige Ch. How. 333. 273.

¹ Redesdale (6th Am. ed.), 304-306; ² Roche v. Morgell, 3 Sch. & Lef. Cooper's Eq. PL 276, 277; Beames' Ir. Ch. R. 721.

actions, the defendant pleaded a release made by the plaintiff, with an averment that the release was prepared with the consent of, and freely and voluntarily executed by, plaintiff, without any fraud or undue practices upon the part of defendant. This plea was held insufficient by Lord Redesdale, because it was not supported by an answer giving full discovery as to all the imputations of unfairness in regard to the accounts, the settlement of such accounts being the consideration upon which the release was obtained. An appeal was taken from Lord Redesdale's order to the House of Lords, where it was affirmed. Upon the hearing in the House of Lords, Lord Redesdale delivered an opinion in vindication of his order appealed from, in which he said: "The release was founded on a general settlement of accounts, which was the consideration for the instrument apparent on the face of it; and was part of the very transaction, and an essential part, being the consideration on which the deed was founded. If the accounts were fairly adjusted, the release was fair, and was a bar to the relief sought by the bill to the time of the settled account; that is, the release would preclude the court from decreeing that the parties should come to a new account upon the same subject. But if the accounts were not fair, if they were liable to all the imputations cast on them by the bill, then the release was not a fair transaction, and ought not to preclude the court from decreeing a new account. The release therefore in no form of pleading could be a bar to the discovery sought by the bill, for upon that discovery would depend the validity of the instrument itself. If the release had been pleaded to the relief only, and the plea had been confined to the transactions prior to the 27th of May, 1791, it might perhaps have been a good plea to a certain extent with proper averments, and provided those averments were supported by a full answer to all the charges in the bill affecting the accounts. . . . Upon argument of a plea, every fact stated in the bill, and not denied by an answer in support of the plea, must be taken for true. . . . Every release must be founded on some consideration, otherwise fraud must be presumed. That consideration must be either a valuable consideration then given, or the adjustment of depending accounts. In the latter case the fairness of the accounts is of the essence of the consid-

eration. If they are not fair the consideration is not fair, and the instrument founded on such a consideration is in itself void, and therefore operates nothing. Where a deed upon consideration is pleaded to a bill in bar of a right which would exist if the deed did not exist, the consideration must be set out, its fairness must be averred by the plea, and if the bill charges matter tending to impeach the consideration, the defendant must by answer support the averments in the plea; a deed therefore cannot be pleaded to a discovery of the transactions on which the consideration of the deed, and consequently the deed itself, is founded. Here the plea does not even put in issue the consideration on which the deed was founded.”¹

§ 282. **Plea of a stated account.**—A stated account may be pleaded in bar to a bill for an account.² The plea should aver that the account was in writing, setting forth the balance,³ and that the stated account is just and true to the best of defendant’s knowledge and belief;⁴ and where the bill impeaches the stated account, and charges the plaintiff has no counterpart of it, and prays that the same be set forth by the defendant, the defendant, if he pleads the stated account in bar, must annex a copy thereof to his answer in support of his plea, so that if there be any errors in the account the plaintiff may have an opportunity to point them out.⁵ Where persons have mutual dealings, signing the account is not necessary to make it a stated one; but acquiescence in it, such as retaining it a reasonable length of time without objection, will render it a stated account.⁶ In order to render an account a stated one, it is not necessary that the vouchers should be delivered up at the time it is made; but such delivery is an affirmation that the account between the parties is a stated one,⁷ and where it has been done

¹ Roche v. Morgell, *supra*.

³ Burke v. Brown, 2 Atk. 397, 399.

² Dawson v. Dawson, 1 Atk. 1, Sumner v. Thorpe, 2 Atk. 1; Willis v. Jernegan, 2 Atk. 250; Burke v. Brown, 2 Atk. 397; Hankey v. Simpson, 3 Atk. 303; Bedell v. Bedell, Finch’s R. 5; Henpert v. Benn, Finch’s R. 344; Sewell v. Bridge, 1 Ves. Sen. 297; For. Rom. 56; Chapdelaine v. Dechenaux, 4 Cranch, 306; Craig v. McKinney, 72 Ill. 305; Weed v. Smull, 7 Paige Ch. 573.

⁴ Richardson v. Greese, 3 Atk. 64, 70.

⁵ Hankey v. Simpson, 3 Atk. 303; Weed v. Smull, 7 Paige Ch. 573.

⁶ Willis v. Jernegan, 2 Atk. 250, 252; Oil Co. v. Van Etten, 107 U. S. 325; Wiggins v. Burkham, 10 Wall. 129; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96.

⁷ Willis v. Jernegan, 2 Atk. 250, 252.

it should be averred in the plea.¹ A stated account may be pleaded in bar to a bill brought for an accounting, and which seeks to avoid the bar of the account by charging that it was procured by unfairness, fraud and error; but the fraud and error must, in such case, be denied by the averments of the plea, and also by answer in support of it.²

§ 283. Plea of an account settled.—The difference between an account stated and an account settled is this: An account stated is where the accounts have been examined by the parties and the true balance between them agreed upon and admitted as the true balance due upon the accounts; when the balance thus agreed upon and admitted is paid, the account is deemed and taken as a settled account.³

§ 284. Plea of an award.—An award may be pleaded in bar to a bill for an account,⁴ or to a bill to set aside the award and open the account;⁵ and the plea is not only good to the merits of the case, but also to the discovery.⁶ But if the bill impeach the award on the ground of error, or a charge of partiality, fraud or corruption against the arbitrators, all such charges must be denied by the averments of the plea and by an answer in support of the plea.⁷

§ 285. Plea of bona fide purchaser.—The defendant may plead in bar of a bill for relief in equity that he is a purchaser for a valuable consideration, without notice of the plaintiff's claim or title. A purchaser for value and without notice is a favorite with a court of equity; and it was said by one of England's great chancellors, that "equity will not disarm a purchaser but will assist him, and precedents of this nature are

¹ For. Rom. 56.

² Chappelaine v. Dechenaux, 4 Cranch, 306; For. Rom. 56; Cooper's Eq. Pl. 297; Redesdale (6th Am. ed.), 302, 303.

³ Endo v. Caleham, Younge, 306; Burk v. Brown, 2 Atk. 399; Sumner v. Thorpe, 2 Atk. 1; Phelps v. Sproule, 1 Myl. & K. 231; Capon v. Miles, 13 Price, 767; Darthez v. Lee, 2 Y. & Coll. 5; Weed v. Smull, 7 Paige Ch. 537.

⁴ Tittenson v. Peat, 3 Atk. 529; Farrington v. Chute, 1 Vern. 72.

⁵ Lingwood v. Croucher, 2 Atk. 395; Burton v. Ellington, 3 Bro. C. C. 196; Brown v. Brown, 2 Ch. Cas. 140; Greenhill v. Church, 3 Ch. R. 49.

⁶ Tittenson v. Peat, 3 Atk. 529.

⁷ Lonsdale v. Littledale, 2 Ves. Jr. 451; Chicot v. Lequesne, 2 Ves. Sr. 315; Kampshire v. Young, 2 Atk. 155; Alardes v. Campbell, Bunb. 265.

very numerous where the court has refused to give any assistance against a purchaser, either to the heir, or to a widow, or to the fatherless, or to creditors.”¹ Such being the favor with which an innocent purchaser is regarded by courts of equity, there is a corresponding strictness established by those courts in the rules of pleading and evidence by which a person is to bring himself within the character of, and the protection secured to, such a purchaser; and therefore the rule as to the requisites of a plea of this character is very strict. The prevailing doctrine is that the purchaser of an equitable title takes it subject to all prior equities; and such a title could not be made the subject of this plea. The requisites of this plea are: (1) The defendant must aver in his plea that he is the purchaser of the legal title to the estate. (2) He must aver that his vendor executed and delivered to him a regular conveyance of the property, sufficient in law to transfer the legal title; he must plead the deed of purchase, setting forth the date, the parties, and contents briefly, and the time of its execution, for that is the peremptory matter in bar. (3) He must state the consideration, and distinctly aver that it was *bona fide* and truly paid, independently of the recitals in the deed; and the amount of the purchase-money must be stated, and when and to whom paid. (4) He must aver that at the time of his purchase his vendor was seized in fee and was in possession of the estate. (5) The plea must deny notice of the plaintiff’s claim and title previously to and at the time of the execution of the deed and the payment of the purchase-money; and this denial must be made in the plea whether it is charged in the bill or not. If the bill charges notice, or charges circumstances from which notice may be inferred, the defendant must in his plea deny them all fully, positively, and in the most precise terms, and without evasion.² (6) If the bill charges any facts or circum-

¹ Lord Nottingham in *Basset v. Nosworthy*, Finch’s R. 102.

² *Boone v. Chiles*, 10 Pet. 179; *Vattier v. Hinde*, 7 Pet. 253, 271; *Townsend v. Little*, 109 U. S. 504, 512; *Smith v. Overton*, Book 18, Lawy. ed. (U. S. Sup. Ct.), 62; *Grimstone v. Carter*, 2 Paige Ch. 436; *Galatian v. Erwin*, Hopk. Ch. 48; *Denning v. Smith*,

3 Johns. Ch. 332; *Lowry v. Tew*, 3 Barb. Ch. 408; *Manhattan Co. v. Evertson*, 6 Paige Ch. 459; *Harris v. Fly*, 7 Paige Ch. 421; *Tompkins v. Ward*, 4 Sandf. Ch. 594; *Trevanian v. Morse*, 1 Vern. 246; *Walwyn v. Lee*, 9 Ves. 32; *Daniels v. Davison*, 16 Ves. 252; *Strode v. Blackburne*, 3 Ves. 225; *Tourville v. Naish*, 3 P. Wms. 306;

stances showing notice or fraud, or which would in any way avoid the bar, such facts must be put in issue by the plea, and must also be precisely and fully denied by an answer in support of the plea.¹ If the purchase be of an estate not in possession, the plea must show how the reversion was created and the vendor became entitled to it.²

§ 286. **Same — Notice.**— Actual and unequivocal possession is notice, because it is incumbent upon one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice.³ A purchaser of land must look to all the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him.⁴ “A purchaser (and, as before observed, a mortgagee is a purchaser *pro tanto*) who has actual notice of one instrument affecting the estate has constructive notice of all other instruments to which an examination of the first could have led him, and if he do not examine into them his conduct amounts to that degree of negligence which will charge him with all the consequences of notice. In all cases where a person cannot make out a title but by a deed which leads to another fact, whether by description of the parties, recital or otherwise, he will be deemed cognizant of it; for it

Fitzgerald v. Buck, 2 Atk. 397; Story v. Lord Windsor, 2 Atk. 63; Hardingham v. Nichols, 3 Atk. 304; Radford v. Wilson, 3 Atk. 815; Wigg v. Wigg, 1 Atk. 383; Brandlyn v. Ord, 1 Atk. 571; Jackson v. Rowe, 4 Russ. 529; Fitzgerald v. Falconbridge, Fitzg. 207; Hart v. Meddlehurst, 3 Atk. 377; Maitland v. Wilson, 3 Atk. 814; Bodwin v. Vandybendy, 1 Vern. 179; Jones v. Thomas, 3 P. Wms. 243; Kelsall v. Bennet, 1 Atk. 522; Moore v. Mayhow, 1 Cas. in Ch. 34; Polk v. Gallant, 2 Dev. & Bat. Eq. (N. C.) 395; For. Rom. 57; Redesdale (6th Am. ed.), 319-324; Beames' Pleas in Equity, 241-254; Cooper's Eq. Pl. 281-288.

¹ Haris v. Ingledew, 3 P. Wms. 94; Price v. Price, 1 Vern. 185; Radford v. Wilson, 3 Atk. 815; Jared v. Saunders, 4 Bro. C. C. 322; Redesdale (6th Am. ed.), 321; Beames' Pleas in Equity, 254; Cooper's Eq. Pl. 284; For. Rom. 57.

² Hughes v. Garth, Ambl. R. 421.

³ Simon Creek Coal Co. v. Doran, 142 U. S. 417, 450; Kirby v. Tallmadge, 160 U. S. 379, 389; Landes v. Brant, 10 How. 348, 375; Lea v. Polk County Copper Co., 21 How. 493, 498; McLean v. Clapp, 141 U. S. 429.

⁴ Simon Creek Coal Co. v. Doran, 142 U. S. 417, 450.

was *crassa negligentia* that he sought not after it; and for the same reason, if a purchaser has notice of a deed he is presumed to have notice of the whole contents of it. Where a party is told of a deed, which from its nature must affect the property, or is told at the time that it does affect the property, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers.”¹

§ 287. **Plea of paramount title.**—To a bill brought upon a ground of equity by an heir at law against a devisee to turn the devisee out of possession, the devisee may plead the will, and that it was duly executed; and upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit.² A long and peaceable possession may be pleaded in bar to a bill in equity for relief; and the following is a plea of that kind which was allowed by Lord Chancellor Loughborough,³ namely:

“This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the complainant’s bill of complaint contained to be true in such manner and form as the same are therein and thereby alleged and set forth, as to all the relief prayed in and by the complainant’s bill of complaint and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover whether he is now in possession of messuages, lands, tenements and hereditaments in the complainant’s bill mentioned, and of the rents and profits thereof, and how long this defendant and those under whom he claims title thereto have been in possession thereof, doth plead in bar, and for plea saith that he and his ancestors, and those under whom he claims to be entitled to said estate, have been in lawful and uninterrupted possession thereof to his and their own absolute use and benefit for forty years last past and upwards, that is to say from the year 1755 down to the present time, without having ever paid over or accounted for all or any part of the rents and profits thereof, and without having, to the knowledge or belief of this

¹ 2 Spence, Eq. Jur. 756, 757.

² Redesdale (6th Am. ed.), 306.

³ Blewitt v. Thomas, 2 Ves. Jun.

669; Beames’ Pl. in Eq. 254–257, 337, 338.

defendant, paid to or accounted with the complainants, or any person or persons under whom they claim and derive title to said estate in and by their bill of complaint, for any sum or sums of money owing to them or any of them which had been lent or advanced upon any mortgages or mortgage of the said estate, or any part thereof (if any such there were), or for or in respect of any interest due or claimed by them or any of them, if any such ever hath arisen, or been claimed by them or any of them during the whole of the period, nor hath this defendant, nor to the belief of the defendant have any of his ancestors or other persons under whom he claims to be entitled to said estate, ever acknowledged or admitted to the complainants, or either of them, or any person or persons under whom they claim title by their bill of complaint, that any money was due and owing to them or any of them for or in respect of any money lent by them or any of them to this defendant or his ancestors, or any persons or person under whom he claims to be entitled to the said estate, if any money was lent, and therefore that it is to be presumed that such mortgage as is stated in the complainant's bill to bear date the 29th day of June, 1737, and to have been made by Thomas Morgan in the said bill named, deceased, to Thomas Clifford in the said bill mentioned, also deceased, under whom this defendant claims title to the said estate, if such mortgage was made, hath been long since paid, satisfied and discharged; all which matters and things this defendant doth aver and plead in bar to so much and such parts of the complainant's said bill as aforesaid, and humbly demands the judgment of this honorable court whether he ought to be compelled to make any further or other answer thereto."

§ 288. Pleas to bills for discovery.—Pleas to bills of discovery are based on the following grounds: 1. "If the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction over it to compel a discovery in his favor, though he falsely states a different case by his bill so that it is not liable to a demurrer, the defendant may by plea state the matter necessary to show the truth to the court." 2. Want of interest of the plaintiff in the subject-matter of the suit. 3. Want of interest of the defendant in the subject-matter of the suit.

4. That the situation of the defendant renders it improper for a court of equity to compel a discovery, as (1) the discovery may subject him to pains and penalties, or (2) to a forfeiture or something in the nature of a forfeiture, or (3) it would betray the confidence reposed in him as counsel or attorney, or (4) because he is a purchaser for a valuable consideration without notice of the plaintiff's title.¹

§ 289. **Pleas to bills not original.**—To a bill of revivor the defendant may plead (1) that plaintiff has no title to revive the suit, or (2) that the right is barred by the statute of limitation, or (3) laches.² To a supplemental bill the defendant may plead that the alleged supplemental matter arose before the original bill was filed; and to an amended bill the defendant may plead that the matter of the amendment arose since the original bill was filed.³ To a cross-bill the defendant thereto may plead in bar any plea that can be interposed to an original bill, except pleas to the jurisdiction of the court and pleas to the person of the plaintiff, the sufficiency of which are both affirmed by the original; but to a cross-bill filed alone by a *feme covert*, infant, idiot or lunatic, the fact of such personal disability may, if it do not appear on the face of the bill, be pleaded by defendant.⁴ To a bill of review for errors apparent on the face of the decree the defendant may plead the decree, or an order allowing a demurrer to a former bill of review for the same matter, or any matter *dehors* the record against opening the decree, as length of time or a purchaser for valuable consideration without notice;⁵ or that the bill of review was not filed within the time limited by statute for taking an appeal from the decree sought to be reviewed, if the objection does not appear upon the face of the bill.⁶ To a bill of review brought to reverse a

¹ Redesdale (6th Am. ed.), 327-335; Cooper's Eq. Pl. 291-301; Beames' Pleas in Equity, 257-286.

² Redesdale (6th Am. ed.), 235-237; Beames' Pleas in Equity, 301-306; Cooper's Eq. Pl. 302.

³ Redesdale (6th Am. ed.), 337; Beames' Pleas in Equity, 309, 310; Cooper's Eq. Pl. 303, 304.

⁴ Redesdale (6th Am. ed.), 337, 338; Beames' Pleas in Equity, 310, 311; Cooper's Eq. Pl. 304.

⁵ Redesdale (6th Am. ed.), 338.

⁶ Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 227; Enslinger v. Powers, 108 U. S. 292; Thomas v. Brockenbrough, 10 Wheat. 146; Whiting v. Bank of U. S., 13 Pet. 6; Kennedy v. Bank of Georgia, 8 How. 586; Ricker v. Powell, 100 U. S. 104; Clark v. Killian, 103 U. S. 766; Reed v. Stanley, 89 Fed. R. 430; Reed v. Stanley, 97 Fed. R. 521.

decree upon new matter, the defendant may interpose any plea which would have avoided the effect of that matter if charged in the original bill,¹ or he may plead that the defendant was guilty of laches in not discovering the new matter before the rendition of the decree which the bill seeks to reverse.² To a bill seeking to impeach a decree on the ground of fraud the defendant should plead the decree with averments in the plea and by an answer in support of the plea denying the fraud.³ To a bill filed to carry a decree into execution the defendant may plead that the plaintiff has no right to the benefit of the decree, if such be the fact and it does not appear from the face of the bill.⁴

§ 290. The form and frame of a plea.—A plea in equity usually consists of five parts, viz.: 1. The first part of the plea is the title. It should be entitled in the cause, and state the name of the defendant or defendants pleading it, thus: "The plea of William Morgan Thomas, defendant, to the bill of complaint of Edward Blewitt, Joseph Newton, Mary Newton, Herbert Phillips, complainants."⁵ When the defendant pleads to a part of the bill and answers to the residue, it should be so expressed in the title, thus: "The plea of Richard Lee and Mary Lee, his wife, to part, and their answer to the residue of the bill of complaint of Henry Williams, complainant."⁶ If the plea is supported by an answer, the title may be thus: "The plea and answer of James Lee, the defendant, to the bill of complaint of James Walwyn, complainant."⁷ 2. The second part of the plea is the protestation against the confession of the truth of any matter contained in the bill, thus: "This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint to be true, in such manner and form as the

¹ Redesdale (6th Am. ed.) 338, 339; Cooper's Eq. Pl. 304, 305.

² Beard v. Burts, 95 U. S. 434.

³ Redesdale (6th Am. ed.), 340; Cooper's Eq. Pl. 305; Beames' Pleas in Equity, 314, 315.

⁴ Redesdale (6th Am. ed.), 340; Cooper's Eq. Pl. 305, 306; Beames' Pleas in Equity, 315.

⁵ This is the title to the plea al-

lowed in Blewitt v. Thomas, 2 Ves. Jr. 669, given in Beames' Pleas in Equity, 337, 338.

⁶ Title of plea allowed in Williams v. Lee, 3 Atk. 223; Beames' Pleas in Equity, 241, 242.

⁷ Walwyn v. Lee, 9 Ves. 24, allowed; Beames' Pleas in Equity, 344, 349.

same are therein and thereby alleged.”¹ 3. “The extent of the plea, that is, whether it is intended to cover the whole bill, or a part of it only, and what part in particular, is stated in the next place; and this must be clearly and distinctly shown.”² In one of the pleas above referred to, which was to all the relief and to a part of the discovery, the extent of the plea was stated thus: “As to all the relief prayed in and by the complainant’s bill of complaint, and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover whether he is now in possession of messuages, lands, tenements and hereditaments in the complainant’s bill mentioned, and of the rents and profits thereof, and how long the defendant, and those under whom he claims title thereto, have been in possession thereof,” this defendant doth plead in bar,³ etc. In one of the pleas above referred to, which was to a part of the bill only, and accompanied by an answer to the residue of the bill, the extent of the plea was stated thus: “As to so much of said bill as seeks to controvert the value of the several goods and things in the bill mentioned to be bequeathed to the said defendant, Mary Lee, by Urania Goodwin, deceased, in the bill named, in respect of which this defendant, Richard Lee, hath recovered a verdict against the said complainant, and which seeks to controvert the right and title of these defendants, or either of them, to the same goods; and also as to so much of the said bill as seeks to impeach the said verdict which this Richard Lee hath obtained against the complainant, in respect to the same goods and effects, these defendants plead in bar.”⁴ 4. The fourth part of the plea consists of the averments which set up the bar and negative matters set up in the bill to avoid the bar. In these averments there must be the same strictness as at law; they should be direct and positive, and should clearly and distinctly state all the facts necessary to render the plea a complete equitable bar to the case made by the bill, or to that part of it covered by the plea.⁵ 5. The fifth part of the plea is the conclusion, and prays

¹ Walwyn v. Lee, 9 Ves. 24, allowed; Beames’ Pleas in Equity, 344, 349.

² Redesdale (6th Am. ed.), 351.

³ Blewitt v. Thomas, 2 Ves. Jr. 669; Beames’ Pleas in Equity, 337, 338.

⁴ Williams v. Lee, 3 Atk. 223; Beames’ Pleas in Equity, 341, 342.

⁵ Redesdale (6th Am. ed.), 340-349.

thus: "All which matters and things these defendants are ready to verify, maintain and prove as this honorable court shall direct, and do plead the same in bar of so much and such parts of the said bill as are hereinbefore mentioned to be pleaded unto, and humbly pray the judgment of this honorable court thereupon, and whether they are liable or shall be compelled to make any further or other answer to so much of the bill as they have hereinbefore pleaded to."¹ A plea to the jurisdiction should pray the judgment of the court whether it will take further cognizance of the cause. A plea in abatement should pray that the suit be abated or dismissed. But when a temporary disability of the plaintiff to sue is pleaded in abatement, the plea should conclude with the prayer that the bill remain without day till the disability be removed, and not for a dismissal of the bill.² If a plea is accompanied by an answer, the answer must follow the conclusion of the plea; if the answer is merely in support of the plea it should be so stated, and that it does not waive the plea, thus: "And these defendants, insisting upon their said plea, and in no wise waiving or departing from the same, or the benefits thereof, but saving to themselves the benefit of said plea;" or thus: "And the defendant, not waiving his said plea, but relying thereon; and, for better supporting the same, for answer saith,"³ etc. If the answer is to the residue of the bill not covered by the plea, it should be so expressed, not waiving the plea, thus: "And these defendants, not waiving their said plea, but wholly relying thereon, for answer to so much of the said bill as they have not pleaded to, say that,"⁴ etc.

§ 291. Plea must be supported by certificate of counsel and affidavit of defendant.—A United States equity rule provides that: No plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by affidavit of the defendant that it is not interposed for delay, and that it is true in point of fact;⁵ and if a plea is not so certified by counsel,

¹ Beames' Pleas in Equity, 343.

⁴ Cunningham v. Wegg, 2 Bro. C. C.

² Beck v. Beck, 7 George (Miss.), 72.

241; Beames' Pleas in Equity, 335.

³ Williams v. Lee, 3 Atk. 223; Wal-

⁵ Equity Rule 31.

wyn v. Lee, 9 Ves. 24; Beames' Pleas in Equity, 342, 349.

and supported by the affidavit of defendant, it is fatally defective, and the plaintiff may disregard it, and enter a decree *pro confesso*.¹ The fact that a plea is sworn to by the defendant does not make it evidence in his favor. The oath of the defendant, that the plea is true in point of fact, is added only for the same purpose as the certificate of counsel, that in his opinion it is well founded in point of law, in order to comply with the thirty-first equity rule, the object of which is to prevent a defendant from delaying and evading the discovery sought without showing that the plea is worthy of the consideration of the court. An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill. But a plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill.²

§ 292. Filing the plea.—After a plea has been prepared it must then be filed in the clerk's office³ and entered upon the order book, and such entry is sufficient notice to the plaintiff that the plea has been filed;⁴ and the plea should be filed on the rule-day next succeeding that of the defendant entering his appearance;⁵ but defendant may file it at any time before the bill is taken for confessed, or afterwards with leave of the court.⁶

§ 293. Proceedings to be taken by plaintiff upon a plea filed.—The equity rules provide that when a plea is filed the plaintiff shall, on the rule-day when the same is filed or on the next succeeding rule-day, either (1) set the plea down for argument upon its legal sufficiency, or (2) he shall take issue upon the plea by filing thereto the general replication; and if he neither sets the plea down for argument nor takes issue

¹ *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 580; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, 90 Fed. R. 598; *Preston v. Finley*, 72 Fed. R. 850; *National Bank v. Insurance Co.*, 104 U. S. 54.

² *Farley v. Kittson*, 120 U. S. 303,

318; *Heartt v. Corning*, 3 Paige Ch. 506.

³ 2 Daniell, 217; Equity Rules 1, 18.

⁴ Equity Rules 4, 5; *Newby v. Oregon Cent. R. Co.*, 1 Sawy. 63, Fed. Cas. No. 10,145.

⁵ Equity Rule 18.

⁶ Equity Rule 32.

upon it within the time prescribed, "he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose."¹ A plea is set down for argument by the plaintiff by entering an order as of course upon the order book to that effect.² The defendant may in like manner set the plea down for argument upon its legal sufficiency.³ There is no demurrer to a plea; the only method by which the plaintiff may test the legal sufficiency of a plea in equity, and obtain the judgment of the court thereon, is to set down the plea for argument.⁴

§ 294. The argument of a plea.—Upon the argument of a plea no issue of fact is presented; the plaintiff, by setting the plea down for argument, admits for the purposes of the argument the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to bar his recovery; the defendant, by interposing a plea, thereby admits that the averments and charges of the bill not denied by the plea are true; and therefore, upon the argument of a plea, the facts stated in the plea, and all the facts alleged in the bill and not controverted by the plea, are deemed and taken as true; and upon the facts thus admitted and taken as true, the court decides upon the legal validity and sufficiency of the defense set up by the plea. And so, upon the argument of the plea, issues of law only are submitted to the court. Upon the argument of the plea five issues of law may arise, namely: 1. Whether the subject-matter of the defense is proper for a plea, or should it be presented by (1) a demurrer, or (2) by an answer; as an illustration, if the plea contains more defenses than one, as matter suitable for a plea and demurrer, or a double bar, which is proper for an answer only, such objections to the plea present issues of law arising upon the face of the bill and the plea, and should be presented and determined upon the argument. 2. Whether the plea is a complete bar to the relief sought by

¹ Equity Rules 33, 38; Rhode Island v. Massachusetts, 14 Pet. 210.

² Equity Rules 4, 5, 33, 38.

³ Beames' Pleas in Equity, 344; 2 Daniell, 219; Redesdale (6th Am. ed.), 353.

⁴ Equity Rules 33, 34; Hatch v. Bancroft-Thompson Co., 67 Fed. R. 802; 2 Daniell, 216-223; Beck v. Beck,

7 George (Miss.), 72.

the bill, or that part of it which the plea is intended to cover. 3. Whether the plea should be supported by an answer giving any of the discovery sought by the bill. 4. Where an answer is on file in support of the plea, whether such answer is sufficient. 5. When an answer is on file in support of the plea, whether the discovery given by such answer shows the plea to be invalid.¹ When a plea is set down for argument upon its legal sufficiency, the defendant's counsel has the right to open and close the argument.² Upon the argument of a plea, the order of the court may be either (1) that the plea be allowed simply, or (2) the benefit of the plea may be saved to the hearing, or (3) it may be ordered to stand for an answer, or (4) it may be overruled.³

§ 295. **Allowing pleas.**—If upon argument a plea is allowed, it is thereby determined to be a full bar to the bill, or to so much of it as it covers; but the plaintiff may then take issue upon it, by filing thereto the general replication, and proceed to examine witnesses and disprove the facts upon which it is endeavored to be supported.⁴ An equity rule provides that the plaintiff may set down the plea to be argued, or he may take issue on it.⁵ This rule does not mean that the plaintiff shall make such a conclusive election, that, if he sets the plea down for argument and it is upon argument allowed, he is thereby precluded from afterwards taking issue upon the plea and disproving it; but after the plea is allowed the plaintiff has the right to take issue upon it, and go to the proofs, and if the court denies him this right it is reversible error, and, upon

¹ 2 Daniell, 98, 102, 118; *Rhode Isl. and v. Massachusetts*, 14 Pet. 210; *Bogardus v. Trinity Church*, 4 Paige Ch. 178; *Gaines v. Mauseaux*, 1 Woods, 118; *Newby v. Oregon Cent. Ry. Co.*, 1 Sawy. 63, Fed. Cas. No. 10,145; *Lewis v. Baird*, 3 McLean, 56, Fed. Cas. No. 8,316; *Cozine v. Graham*, 2 Paige Ch. 178; *Fish v. Miller*, 5 Paige Ch. 26; *Phelps v. Garrow*, 3 Edw. Ch. 139; *Bolton v. Gardner*, 3 Paige Ch. 273; *Orcutt v. Orms*, 3 Paige Ch. 459; *Roche v. Morgell*, 2 Sch. & Lef. 721, 727; *Redesdale* (6th Am. ed.), 354, 355.

² *Rhode Island v. Massachusetts*, 14 Pet. 210.

³ *Redesdale* (6th Am. ed.), 353; 2 Daniell, 223.

⁴ *Redesdale* (6th Am. ed.), 353; *Beames' Pleas in Equity*, 324, 325; 2 Daniell, 223, 224; *Equity Rule 33*; *Pearce v. Rice*, 124 U. S. 28, 43; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 634; *United States v. California & Oregon Land Co.*, 148 U. S. 31; *Green v. Bogue*, 158 U. S. 478; *Cooper's Eq. Pl.* 232.

⁵ *Equity Rule 33*.

appeal, the appellate court will reverse the cause and remand it to the circuit court, with a direction to allow the plaintiff to reply to and join issue on the plea.¹ By taking issue upon the plea after it has been held sufficient and allowed upon argument, the plaintiff does not preclude himself from raising the question of the sufficiency of the plea upon appeal; and he may, in view of equity rule 33 (which declares that "if, upon an issue, the facts in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him"), ask the supreme court to review the decree of the lower court in respect to the sufficiency of the decree.² An equity rule provides that, if the plea be allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.³ In the equity practice, special replications have long since been discontinued, and expressly prohibited by a United States equity rule.⁴ In many cases where a plea is allowed, the plaintiff is able to avoid the effect of the plea by the averment of new matter; and, as special replications are not allowed, the plaintiff must bring forward his matter in avoidance by amending his bill. Since the discontinuance of special replications, the universal practice in the circuit courts of the United States is that: when the defendant, in his plea or answer, sets up new matter, and the plaintiff desires to put that new matter in issue, or to avoid it, or to explain it, he must do it by amending the charging part of his bill; that is, the plaintiff must set up in an amended bill, "by way of pretense," the new matter set up by defendant, in his plea or answer, as a defense, and meet them by counter averments, or avoid them, or explain them; the amended bill, under the modern practice, performs precisely the same functions which a special replication performed under the old practice.⁵

¹ *Pearce v. Rice*, 124 U. S. 28, 43; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 634; *United States v. California & Oregon Land Co.*, 148 U. S. 31.

² *Green v. Bogue*, 158 U. S. 478.

³ Equity Rule 35.

⁴ Equity Rule 45.

⁵ *Brooks v. Stolley*, 4 McLean, 275,

Fed. Cas. No. 1,963; *Duponti v. Mussy*, 4 Wash. 128, *Fed. Cas. No. 4,185*; *Shields v. Barrow*, 17 How. 130; *Marsteller v. McLean*, 7 Cranch, 156; *Vattier v. Hinde*, 7 Pet. 252; *Piatt v. Vattier*, 9 Pet. 405; *Taylor v. Brenham*, 5 How. 233; *Storms v. Storms*, 1 Edw. Ch. 358; *Spencer v. Van Duzen*, 1 Paige Ch. 555; *Weed v.*

§ 296. **Saving the benefit of a plea to the hearing.**—"If upon argument the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court it may be a defense; but that there may be matter disclosed in the evidence which may avoid it, supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question."¹ And "when the benefit of a plea is saved to the hearing, the decision of the cause does not rest upon the truth of the matter of the plea; but the plaintiff may avoid it by other matter, which he is at liberty to adduce."² The effect of such an order is to give the plaintiff an opportunity of replying and going into the evidence; and the part of the bill covered by the plea is not to be further answered.³

§ 297. **Ordering a plea to stand for an answer.**—The rule on this subject is stated by Chancellor Walworth as follows: "When a plea is ordered to stand for an answer it is determined that it contains matter which, if put in the form of an answer, would have constituted a valid defense to some material part of the matters to which it is pleaded as a bar; but that it is not a full defense to the whole matter which it professes to cover; or that it is informally pleaded; or that it is improperly offered as a defense by way of plea, or that it is not properly supported by an answer. If a simple plea to a whole bill, unaccompanied by an answer, is allowed to stand for an answer, without reserving to the complainant the right to except, it is to be deemed a sufficient answer, though not necessarily a full and perfect defense to the whole bill. But if the plea is ordered to stand for an answer with liberty to except, or is accompanied by an answer which will enable the complainant to except without such special leave, the master, upon a reference of the exceptions, must inquire and ascertain whether the bill is fully answered, taking the plea as a part of that answer; unless the court, in permitting the plea to stand for an answer, declares as to what part of the bill it is to be considered a good defense. The court, however, sometimes prohibits

Smull, 7 Paige Ch. 573; 1 Daniell, 484;

2 Daniell, 387, 388; Redesdale (6th Am. ed.), 382, 383, 384; 1 Barb. Ch. Prac. 250; Story's Eq. Pl., secs. 676, 678, 878, 884, 885, 887.

¹ Redesdale (6th Am. ed.), 354.

² Cooper's Eq. Pl. 233; Pearce v. Rice, 142 U. S. 28, 43.

³ 2 Daniell, 226.

the complainant from calling upon the defendant, by exceptions, to answer particular matters as to which he is not legally bound to answer.”¹ This statement of the rule was cited with approval by Justice Story on the circuit.² When a plea is ordered to stand for an answer, the plaintiff should always be careful to have inserted in the order the words, “with liberty to the plaintiff to except,” or the order may have the effect to establish the plea as a sufficient answer to so much of the bill as it covers.³

§ 298. Overruling pleas.—“If a plea states nothing which can be used as a defense it is merely overruled.”⁴ And the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea, the next succeeding day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly. And the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied he has good grounds in point of law or fact to interpose the plea, and it was not interposed vexatiously or for delay.⁵

§ 299. Proceedings upon a plea of matter of record.—According to the English practice, when the defendant filed a plea of a former suit pending, or a former decree in equity, such plea was not usually set down to be argued, nor did the plaintiff take issue upon it, but it was generally referred to one of the masters of the court to make examination and inquiry into the fact and to report to the court; and, upon the coming in of the master's report, if he reported the plea to be true the bill stood instantly dismissed unless the court otherwise ordered. The plaintiff could, however, except to the master's report

¹ *Orcutt v. Orms*, 3 Paige Ch. 459; citing *Brereton v. Gamul*, 2 Atk. 240; *Bagley v. Adams*, 6 Ves. Jr. 586; *Sellon v. Lewen*, 3 P. Wms. 239; *Kirby v. Taylor*, 6 Johns. Ch. 254.

² *Wood v. Mann*, 1 Sumn. 506, Fed. Cas. No. 17,951.

³ *Maitland v. Wilson*, 3 Atk. 815; *Sellon v. Lewen*, 3 P. Wms. 239; *Coke v. Wilcocks*, Mosel. 73.

⁴ *Redesdale* (6th Am. ed.), 355.

⁵ *Equity Rule 34*.

and take the judgment of the court on the sufficiency of the plea. And if he conceived the plea to be defective in point of form or otherwise, independently of the mere truth of the plea, he could set it down to be argued, as in the case of pleas in general.¹ But the supreme court of the United States has recognized it as proper practice to set down such pleas to be argued, and, if allowed, then to take issue upon them and go to the proof; and upon appeal the order of the lower court as to the sufficiency of the plea may be reviewed.²

§ 300. The effect of joining issue upon and establishing plea by proof — The English rule abolished.— The rule in the English High Court of Chancery was: If the plaintiff replied to the plea and denied the truth of the facts therein stated, he thereby admitted that, if the particular facts stated in the plea were true, they were then sufficient in law to bar his recovery; and if the facts were proved to be true, the bill was dismissed as a matter of course, without reference to the equity arising from any other facts stated in the bill; and this rule prevailed in the courts of the United States³ until the adoption of the equity rules of 1822, by which it was abolished.⁴ The equity rule of 1822 (which is still in force) by which the English rule above referred to was abolished declares that: "If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far in law and equity as they ought to avail him."⁵ This rule, it has been declared by the United States supreme court, "takes from the establishment of the plea the effect it had under the old law. When, by filing a replication, issue is taken upon a plea, the facts, if proved, will now avail the defendant only so far as, in law and equity, they ought to avail him." And, under the existing rule upon the final hearing, although the truth of the facts averred in the plea may be fully established by the proof, the decision of the cause does not necessarily rest upon the truth of the plea; but the

¹ Redesdale (6th Am. ed.), 356, 357; 303, 314; Pearce v. Rice, 142 U. S. 28, 43; Redesdale (6th Am. ed.), 353, 354; Beames' Pleas in Equity, 331, 332.

² Green v. Bogue, 158 U. S. 478.

³ Rhode Island v. Massachusetts, 14 Pet. 210; Hughes v. Blake, 6 Wheat. 453, 472; Farley v. Kittson, 120 U. S.

Beames' Pleas in Equity, 325.

⁴ Pearce v. Rice, 142 U. S. 28, 43.

⁵ Equity Rule 33.

plaintiff may avoid the bar of the plea by other facts, if established by the proof under the pleadings.¹

§ 301. **The effect of falsifying a plea in bar.**—When a defendant in equity files a plea in bar of the whole bill, he thereby admits the truth of every allegation and charge in the bill which is not denied by the plea; and this admission is, for all purposes of the suit, just as conclusive and absolute as if it were expressly made by the defendant upon the record, or by a decree *pro confesso* duly made and entered upon the default of the defendant. And if the plaintiff takes issue upon the plea, the only matter in issue between the parties is the truth of the plea; and if, upon the hearing, the court finds from the evidence that the plea is untrue, then all of the allegations and charges of the plaintiff's bill are conclusively established as true, and the plaintiff is entitled to an immediate decree against the defendant, according to the averments and prayer of the bill. And if any discovery sought by the bill is necessary to ascertain the extent of the relief to which the plaintiff is entitled, or to take an account, the plaintiff may have an order that the defendant be examined upon interrogatories, before a master, to obtain such discovery; and the defendant will not be permitted to answer the bill, nor file any defense thereto whatever.² In this respect Lord Eldon declared courts of equity follow the analogy of a plea at common law; the rule at law being that: When the plaintiff takes issue upon the defendant's plea, whether it be a plea by way of traverse or confession and avoidance, and the jury find a verdict against the defendant upon that issue, the plaintiff's declaration is thereby established, and he is entitled to judgment against the defendant upon the verdict.³ Chancellor Walworth states the rule substantially as follows: Where a plea in bar to the whole bill is put in, if the plaintiff takes issue thereon, there is nothing in question but the truth of the plea; if the plea is untrue the plaintiff will be

¹ *Pearce v. Rice*, 142 U. S. 28, 43.

² *Kennedy v. Creswell*, 101 U. S. 641, 646; *Dows v. McMichael*, 2 Paige Ch. 345; *Bell v. Woodward*, 48 N. H. 444; *Barley v. Adams*, 6 Ves. 594; *Wood v. Strickland*, 2 Ves. & Beames, 158; *Brownsword v. Edwards*, 2 Ves.

Sr. 243; *Hawtry v. Trollop*, Nelson, 119; *Wigram on Discovery*, 36; *Langdell's Eq. Pl.*, secs. 98, 147; *Redesdale* (6th Am. ed.), §53; *Beames' Pleas in Equity*, 325.

³ *Barley v. Adams*, 6 Ves. 594.

entitled to a decree against the defendant, in the same manner as if the several matters charged in the bill had been confessed or admitted by the defendant. If a discovery is necessary to enable the plaintiff to obtain the relief sought for by the bill, the defendant cannot evade giving it by putting in a false plea; in such a case, after the plea is found false, the plaintiff may have an order that the defendant be examined on interrogatories, before a master, as to the several matters in relation to which a discovery was sought by the bill.¹

§ 302. The effect of proving dilatory pleas.—If a plea to the jurisdiction be established by the proof, the decree is that the court has no jurisdiction to entertain the cause, and that the bill be dismissed without prejudice.² If a plea in abatement be established by the proof, the decree is that the bill be dismissed without prejudice, or, if the disability or impediment to the prosecution of the suit is temporary, that the bill remain without day till the disability be removed.³

§ 303. Plea allowed by prematurely excepting to answer. “Where a defendant pleads or demurs to any part of the discovery sought by the bill, and answers likewise” (to a part of the discovery sought by the bill), “if the plaintiff takes exception to the answer before the plea or demurrer has been argued, he admits the plea or demurrer to be good; for unless he admits it to be good, it is impossible to determine whether the answer is sufficient or not. But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued.”⁴ In a case⁵ before Lord Eldon it was urged by the attorney-general that the proposition of Lord Redesdale, that a plea or demurrer to any part of the discovery was allowed by the plaintiff’s excepting to the answer before such plea or demurrer was argued, was not supported by the citation of any adjudicated case; but

¹ Dows v. McMichael, 2 Paige Ch. 646.

² 18 U. S. Stat. at L., ch. 137, secs. 5, 472; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 136 U. S. 356, 336.

³ Beames’ Pleas in Equity, 50, 51; *Beck v. Beck*, 7 George (Miss.), 72.

⁴ Redesdale (6th Am. ed.), 378; *Siffkin v. Manning*, 9 Paige Ch. 222.

⁵ *Boyd v. Mills*, 13 Ves. 85.

Lord Eldon held that the proposition was supported by reason, and that in such a case the plaintiff admitted the validity of the plea or demurrer by excepting to the accompanying answer before the plea or demurrer had been argued and its validity determined by the court. In that case, however, the chancellor permitted the plaintiff, upon payment of costs, to withdraw his exceptions, and set the demurrer down for argument, with liberty to again except after the demurrer should be passed upon by the court. The reasoning which supports the rules is this: The plaintiff by his bill requires the defendant to give discovery. The defendant, by his plea or demurrer to a part of the discovery sought by the bill, denies that the plaintiff is entitled to that part of it, and declines to give it; but by his accompanying answer to another and a distinct part of the discovery sought by the bill admits that the plaintiff is entitled to some of the discovery sought by the bill, and gives in his answer a part of the discovery sought. But the plaintiff, before the validity of the plea or demurrer denying a part of the discovery is determined by the court, files his exceptions to the answer, alleging that the defendant has not given all the discovery sought by the bill, and prays the court to compel him to give the discovery withheld, and which he, by his plea or demurrer, denies the plaintiff is entitled to have. But the court cannot determine the exact extent of the discovery which the plaintiff is entitled to have and require from the defendant, until the validity of the plea or demurrer to part of the discovery has been argued and decided; for, upon argument, the plea or demurrer may be allowed, and the discovery covered by it denied by the court, or it may be overruled, and the plaintiff decreed to be entitled to the discovery covered by it. Until the validity of the plea or demurrer is determined, the court cannot know the extent of the discovery the plaintiff is entitled to require. And as the plaintiff, by his exceptions to the answer, prays the court to determine the full extent of his right to discovery, he is conclusively presumed to have elected to admit the validity of the plea or demurrer, for he has asked the court to do that which it cannot do without such admission. The ascertainment of the validity or invalidity of the plea or demurrer is a condition precedent to the action of the court upon the exceptions; and the demand by

the plaintiff for the action of the court upon his exceptions, before the validity or invalidity of the plea or demurrer has been passed upon by the court, is conclusively taken and deemed as a waiver of the action of the court, and an admission of the validity of the plea or demurrer. The principle involved has no application to a plea or demurrer to a part of the relief, and an answer to the residue of the relief; nor has it any application to a plea to the relief, and an answer in support of the plea.¹

§ 304. **Amending pleas.**—Under the federal statute of amendments and jeofails, the court may at any time permit the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion, and by its rules, prescribe;² and this power to allow amendments extends to equity pleadings. It has always been the practice in courts of equity to allow the amendment of pleas, where there has been an evident slip or mistake, and the material ground of the defense is made to appear to the court to be good; but the court will require that it be informed precisely what the proposed amendment is to be, and how the mistake occurred, before the amendment is allowed; and a defendant has been allowed to withdraw his plea and plead *de novo*.⁴

¹London Assurance Co. v. East India Co., 3 P. Wms. 325, 327; Boyd v. Mills, 13 Ves. 85; Darnell v. Reymmer, 1 Vern. 344; Sidney v. Perry, 2 Dick. 602; Siffkin v. Manning, 9 Paige Ch. 222.

Hunt v. Rousmaniere, 2 Mason, 342, Fed. Cas. No. 6,898; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. R. 599, 600.

⁴Cooper's Eq. Pl. 234; Beames' Pleas in Equity, 328, 329.

²1 U. S. Stat. at L., ch. 20, sec. 32, 91; U. S. R. S., sec. 954.

CHAPTER XIII.

DISCLAIMER.

§ 305. Defense by disclaimer.

306. Practice in regard to disclaimers.

§ 305. **Defense by disclaimer.**—“A defendant may disclaim all right or title to the matter in demand by the plaintiff’s bill, or by any part of it. But a disclaimer cannot often be put in alone. For if the defendant has been made a party by mistake, having at the time no interest in the matter in question, yet, as he may have had an interest which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is a fact or not; and, if the defendant has had an interest which he has parted with, an answer may be also necessary to enable the plaintiff to make the proper party, instead of the defendant disclaiming. The form of the disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient; but the forms given in the books of practice are all of an answer and disclaimer. If the defendant disclaims, the court will generally dismiss the bill as against him with costs. But it has been said that, if the plaintiff shows a probable cause for exhibiting the bill, he may pray a decree against the defendant, upon the ground of the disclaimer. Where the defendant disclaims, the plaintiff ought not to reply.”¹

§ 306. **Practice in regard to disclaimers.**—Where a disclaimer and answer go to the whole bill and the answer is insufficient, and there are allegations in the bill unanswered, and to which the plaintiff is entitled to an answer, his proper course is to except to the answer for insufficiency; and the defendant cannot by disclaimer deprive the plaintiff of the right of requiring a full answer, unless it is evident that the defendant ought not, after such disclaimer, to be continued as a party to

¹ Redesdale (6th Am. ed.), 378, 379, 380.

the suit. Exceptions cannot be filed to a simple disclaimer; the only remedy of the plaintiff who is entitled to an answer in such a case is to move to take the disclaimer off the files; but where the disclaimer is accompanied by an answer, the proper course is to except to the answer on the ground of insufficiency.¹ While a defendant can disclaim an interest, he cannot disclaim a liability.² A defendant cannot by answer claim what by disclaimer he has declared he has no interest in or right to; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.³ A defendant who has improperly interfered with a plaintiff's rights, so as to render a suit necessary for the protection of those rights, may be compelled to answer the whole bill and have the costs decreed against him, notwithstanding his disclaimer.⁴ And where a bill was filed to compel trustees to pay a trust fund to the plaintiff, and alleges that other defendants had rendered the suit necessary by setting up a claim to the fund, and the bill also alleges collateral facts in support of the main fact of their previous pretended claim, and seeks to have costs decreed against them, such defendants cannot, by disclaimer, protect themselves from answering all the facts and collateral circumstances alleged in the bill to show that they did set up such claim.⁵ If a defendant disclaims, and afterwards discovers that he had an interest which he was not apprised of at the time he disclaimed, the court will, upon the ground of ignorance or mistake, permit him to withdraw his disclaimer and make his claim; but in such case the court will require the defendant to make a strong showing by affidavit setting forth the facts.⁶ And the defendant who disclaims, and shows that he had an interest but has parted with it, and points out the person to whom he transferred it, need not answer further; but where it is shown that there was probable cause for bringing the suit, the plaintiff may bring the cause to a hearing and have a decree against the disclaiming defendant and all claiming under him since

¹ Ellsworth v. Curtis, 10 Paige Ch. 105.

² Glassington v. Thwaites, 2 Russ. 458.

³ Redesdale (6th Am. ed.), 380, 381.

⁴ Hutchinson v. Reed, Hoff. Ch. 316.

⁵ Graham v. Coape, 3 Myl. & Cr. 638.

⁶ Cooper's Eq. Pl. 310, citing Seton v. Slade, 7 Ves. 265.

the institution of the suit, without costs on either side.¹ A disclaimer may be accompanied by a demurrer, or a plea, or an answer, but all these defenses must clearly refer to separate and distinct parts of the bill.² A disclaimer should be put in upon oath, and must be signed by the defendant, and in no case can such signature with propriety be waived, since no record will be received without signature which tends to prejudice the rights of the defendant.³ Though a disclaimer is in substance distinct from an answer, yet it generally adopts in most respects the formal parts of an answer, the words of course preceding and concluding an answer being used in a disclaimer.

¹ *Spofford v. Manning*, 2 Edw. Ch. 358.

² 1 Smith's Ch. Pr. 275.

³ Cooper's Eq. Pl. 311.

² Cooper's Eq. Pl. 309, 310; 1 Smith's Ch. Pr. 200, 275.

CHAPTER XIV.

ANSWERS.

- § 307. When the answer must be filed.
308. Dilatory objections not presented by answer.
309. The twofold office of an answer in equity.
310. The general nature of an answer as a defense.
311. Any number of consistent defenses may be set up in an answer.
312. What defenses in equity must be set up by answer.
313. Any defense to the merits may be set up by answer.
314. Same—Equity rule 39.
315. Same—A judicial construction of equity rule 39.
316. Defendant's duty to make discovery.
317. The manner in which the defendant must answer the bill.
318. Defendants must seek information to enable them to give discovery.
319. Discovery of deeds, papers and documents.
320. Exceptions to the rule requiring the defendant to make discovery.
321. Same—Manner of making objections to giving the discovery.
322. Effect of answer as evidence when defendant denies allegations of the bill.
323. Same—Tested by the rules of evidence.
324. Answer is not evidence for defendant when it admits allegations of the bill and states new matter to avoid them.
- § 325. Admissions made by defendant in his answer are conclusive.
326. Answer of one defendant not evidence against co-defendant.
327. Setting cause down for hearing on bill and answer.
328. Effect of answer as evidence when oath is waived.
329. The rule determining what allegations in the answer are responsive.
330. When answer of one defendant inures to the benefit of his co-defendant.
331. Answers in patent suits.
332. Same—Notice of proof and decree.
333. Same—Defense that device is not patentable.
334. Procedure to compel answer.
335. Same—When nominal party need not appear.
336. The form of an answer.
337. Signature and oath of defendant.
338. Answer by a married woman.
339. Answer by an infant.
340. Same—Method of appointing guardian *ad litem*.
341. Answer of idiots and lunatics.
342. Answer of corporations.
343. Amending answers and filing supplemental answers.
344. Same—United States equity rules.
345. Requisites of application to amend an answer, or file a supplemental answer.

§ 346. When answer may be amended, or supplemental answer filed.

347. Supplemental answer to amended bill.

§ 348. A further answer upon sustaining exceptions for insufficiency.

349. Taking answers off the file.

§ 307. When the answer must be filed.—If the defendant does not except to the bill for scandal nor impertinence, nor interpose a plea or demurrer to the bill, it shall be his duty, unless the time shall be enlarged, to file his answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance;¹ and upon overruling a plea or demurrer, the defendant shall be assigned to answer the bill on the next rule-day, or at such other time as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done;² and the defendant may file his answer at any time before the bill is taken for confessed, or afterwards with leave of the court.³

§ 308. Dilatory objections not presented by answer.—Objections to the jurisdiction of the court, and matters in abatement, cannot be presented by answer, but should be raised by special plea.⁴ To this there is one exception, specially made by a United States equity rule, which provides that the defendant may suggest by his answer that the bill is defective for want of parties, and that the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only.⁵

§ 309. The twofold office of an answer in equity.—The office and functions of an answer in equity are determined by the office and functions of the bill which calls it forth; the character and essential nature of the answer is, and of necessity must be, determined by the character and essential nature of the bill to which it is a response. Now, the offices of an original bill are: 1. A pleading (1) to state in legal form all the essential ultimate facts which constitute the equity of plaintiff, and upon which he rests his claim to relief; and (2) to an-

¹Equity Rule 18.

²Equity Rule 34.

³Equity Rule 32.

⁴Equity Rule 39; *Livingston v.*

Story, 11 Pet. 352; *Wickliffe v. Owings*, 17 How. 47; *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952.

⁵Equity Rule 52.

ticipate and state the facts or pretended facts which defendant will set up as a defense to the case made by the bill and to avoid such defense by the statement of other facts. 2. To obtain from defendant a discovery and admission of facts which (1) support and prove or tend to support and prove the case for relief made by plaintiff in his bill; and (2) which counterprove and destroy or tend to counterprove and destroy the defense which the defendant will set up to the bill to defeat the relief sought by it.¹

It follows from the nature of the bill that the office of an answer in equity is twofold, namely: (1) It is a statement in legal form of all the essential ultimate facts which constitute the defense of the defendant to the case made for relief against him by the plaintiff's bill; and (2) it is an examination of the defendant upon oath to obtain from him the discovery sought by the bill to support and prove the plaintiff's case and to disprove the defense of the defendant. It contains the defensive allegations of the defendant, and the discovery upon oath required of him by the plaintiff, indiscriminately blended in one record.² The defensive allegations and the discovery often embrace facts arising out of, or closely connected with, the same transaction, which cannot be separately stated without needless prolixity and repetition; and, in such cases, it would seem that there is no sound reason why the elements of the answer should be stated separately. If the defendant sets up in his answer a defense which the plaintiff has in his bill anticipated and repelled by matter of avoidance, and in regard to which he has sought discovery, it would certainly be in consonance with reason and convenience to embrace the defensive allegations and the discovery in one complete statement of the entire transaction. A part of a transaction, indivisible in itself, may constitute the defensive allegations; and another part

¹ Langdell's Eq. Pl., sec. 56; *McCloskey v. Barr*, 40 Fed. R. 559; *Redesdale* (6th Am. ed.), 50; 1 *Daniell*, 484, 485; *Story's Eq. Pl.*, sec. 31; *Adams' Eq.* 303; *Mechanics' Bank v. Levy*, 3 *Paige Ch.* 606; *Stafford v. Brown*, 4 *Paige Ch.* 88, 91; *Hawley v. Wolverton*, 5 *Paige Ch.* 522, 525; *Watson v. Rennick*, 4 *Johns. Ch.* 381; *Robinson v. Davis*, 1 *Blatchf.* 238, Fed. Cas. No. 11,880; 1 *Smith's Ch. Pr.* 660, 666; *Wigram on Discovery*, secs. 18, 276, 277, 278, 279, 281; *Hare on Discovery*, sec. 5, p. 212.

² *Wigram on Discovery*, 11, 94, 113, 114, 143; *Hare on Discovery*, 223; *Langdell's Eq. Pl.*, sec. 68; 2 *Daniell*, 238, 239, 240.

of the same transaction may constitute the discovery sought; and in such a case nothing can be gained by splitting up the transaction and presenting the defense and the discovery in separate and distinct statements, scattered through different parts of the answer. In the preparation of an answer in equity the greatest care of the pleader should be, not the separation of the defensive allegations from the discovery, but (1) to state upon the record with clearness and precision, and in legal and logical form, the defense to the case made by the bill for relief;¹ and (2) to give the discovery to which plaintiff is entitled in such a direct and positive manner that he can have no doubt as to what part of the facts of his case are admitted by the defendant, and what part are controverted.²

§ 310. The general nature of an answer as a defense.—It has been shown in the chapter on pleas that defenses in bar to actions at common law are either (1) by way of traverse, or (2) by way of confession and avoidance, or (3) by matter of estoppel, which neither admits nor denies the facts averred by the plaintiff, but concludes him by the averment of some matter of estoppel, as a record, or deed, or matter of fact, to which the plaintiff is a party or privy, and which, being inconsistent with his allegations, precludes him from availing himself of them.³ These classes of defenses are all available, in cases where they apply, respectively, in bar of the relief sought by a bill in equity, and embrace every kind of defense that may be made to the merits. Lord Redesdale defines a defense by answer as follows: "An answer generally controverts the facts stated in the bill, or some of them, and states other facts to show the rights of the defendant in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and, either with or without stating additional facts, submits the question arising upon the case thus made to the judgment of the court."⁴ This language is adopted by Judge Story in his work on equity pleading.⁵ In order for a defendant to avail himself of a defense, it must be stated in a clear and un-

¹2 Daniell, 240, 241; Langdell's Eq. ch. 2, secs. 38-42; Stephen's Pl. Pl., sec. 79. (Heard), 51, 195-197.

²Brown v. Pierce, 7 Wall. 211.

⁴Redesdale (6th Am. ed.), 15, 16.

³Tidd's Prac. 590; 1 Chitty's Pl. (9th Am. ed.) 469-511; Gould's Pl.,

⁵Story's Eq. Pl., sec. 849.

ambiguous manner in the answer;¹ but the rule obtains in equity pleading that, in stating a cause of action or a defense, it is sufficient to aver the essential ultimate facts upon which the claim or right is made to rest.² Deeds and writing should be pleaded according to their legal effect, and not according to their form of words.³

§ 311. Any number of consistent defenses may be set up in an answer.—A defendant in equity is at liberty to set up in his answer as many defenses as he pleases if they are consistent with each other; he may traverse the allegations upon which the plaintiff's title to relief is founded, and may at the same time set up in his answer any matters of fact as a separate and distinct defense to the claim for relief made by the bill or some part thereof; and he may in like manner, after traversing the allegations which constitute the equity of the bill, set up any number of separate and distinct affirmative defenses to the claim for relief made by the bill or some part thereof. But the affirmative defenses set up must not be inconsistent with each other nor with the traverse; for it is a rule of equity pleading that a defendant cannot set up two distinct defenses in his answer which are so inconsistent with each other that, if the matters constituting one defense are truly stated, the matters upon which the other defense is attempted to be based must necessarily be untrue in point of fact.⁴

§ 312. What defenses in equity must be set up by answer. The only proper defense for a plea in bar is one which reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to that part of it to which the plea applies, and thus avoids the necessity of making the discovery asked for, and the expense of going into the evidence at large; and, therefore, if the defendant wishes to set up as a defense

¹ Stanley v. Robinson, 1 R. & M. 527.

² Ely v. New Mexico & Arizona Ry. Co., 129 U. S. 291; St. Louis v. Knapp, 104 U. S. 658.

³ 1 Daniell, 410, 411, 468, 469; Equity Rule 26.

⁴ Hopper v. Hopper, 11 Paige Ch. 46; Wood v. Wood, 2 Paige Ch. 108;

Sharp v. Carlisle, 5 Dana (Ky.), 488; National Mfg. Co. v. Meyers, Fed. Cas. No. 357; Jesus College v. Gibbs, 1 Younge & Coll. 145; Leech v. Bailey, 6 Price, 504; Ozark Land Co. v. Leonard, 24 Fed. R. 658; Scanlan v. Scanlan, 134 Ill. 630, 640; Stone v. Moore, 26 Ill. 165; Graham v. Mason, 4 Cliff. 88, Fed. Cas. No. 5,671.

various facts which are not conducive to a single point on which the defendant means to rest his defense to the suit or some part of it, or if he wishes to avail himself of separate and distinct matters of defense, or if he wishes to set up separate and distinct defenses, or if he wishes to meet all the allegations of the bill, he must resort to an answer.¹ The distinction between that class of defenses which may be set up by plea, and which must be set up by answer, is well illustrated in the case of Rhode Island against Massachusetts. In that case the state of Rhode Island filed an original bill in equity against the state of Massachusetts in the supreme court of the United States, invoking the original jurisdiction of that court vested in it by the federal constitution, to establish the boundary between the two states, according to their respective charters, and to be restored to the right of jurisdiction and sovereignty over that part of her territory of which she alleged the state of Massachusetts had unjustly deprived her. To this bill the state of Massachusetts filed a plea in bar, in which it was in substance averred that the two states had, by their commissioners duly appointed, settled the disputed boundary by mutual agreement, and that pursuant to the agreement the state of Massachusetts had, for more than one hundred years, been in the unmolested possession of the territory which Rhode Island claimed by her bill. In delivering its judgment upon the argument of the plea, the court, speaking through Chief Justice Taney, said: "The defense set up by this plea is two-fold: 1. That there was an accord and compromise of a disputed right. 2. Prescription, or an unmolested possession from the time of the agreement, that is, of more than one hundred years. These two defenses are entirely distinct, and depend upon different principles." The plea was accordingly overruled, upon the ground that it presented a defense which could be

¹Rhode Island v. Massachusetts, 25 Fed. R. 26; Didier v. Davison, 2 Sandf. Ch. 61; Goodrich v. U. S. 303; United States v. California & Oregon Land Co., 148 U. S. 31, 49; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; United States v. American Bell Tel. Co., 30 Fed. R. 523, 524; McCloskey v. Barr, 38 Fed. R. 165; Hostetter Co. v. E. G. Lyons Co., 99 Fed. R. 734; Hazard v. Dur-

rant, 25 Fed. R. 26; Didier v. Davison, 2 Sandf. Ch. 61; Goodrich v. Pendleton, 3 Johns. Ch. 384; Loud v. Sergeant, 1 Edw. Ch. 164; Redesdale (6th Am. ed.), 257, 258; Beames' Pleas in Equity, 1-28; 2 Daniell, 97, 102, 103, 104; Saltus v. Tobias, 7 Johns. Ch. 214; Whitehead v. Brockhurst, 1 Bro. Ch. 404.

presented by answer only.¹ A defendant may, by a plea in bar, set up the defense that he is a *bona fide* purchase or a valuable consideration, without notice of the plaintiff's title; but if the defendant wishes to go farther, and claim that, pursuant to his purchase, he in good faith entered into possession and, with the knowledge of the plaintiff, made permanent and valuable improvements upon the property, then he must resort to an answer.² A release, simply, may be set up by plea; but if, in addition to the release, the defendant wishes to rely upon peaceable and adverse possession had pursuant to the release, he must set up the whole by an answer.³

§ 313. Any defense to the merits may be set up by answer.

The defendant is not required to set up any defense to the merits by a special plea, but he has always been at liberty to set up by way of answer any special matter which might be pleaded in bar of the bill.⁴ In the chapter on pleas an attempt was made to classify the various defenses that may be presented by a plea in bar, though it is not pretended that the classification embraces all such defenses. Inasmuch as those defenses may be presented by way of answer as well as by plea they are stated here in a recapitulated form. They are as follows: 1. The statute of limitations. 2. The statute of frauds. 3. Any other public statute which destroys the demand of the plaintiff. 4. Any private or particular statute. 5. A decree in equity by which the rights of the parties have been determined. 6. A verdict and judgment at law. 7. A judgment or sentence of a court of probate or some other domestic court. 8. A judgment of a foreign court. 9. A release. 10. A stated account. 11. A settled account. 12. An award. 13. *Bona fide* purchaser for value without notice. 14. Title in defendant founded upon (1) a will, (2) a conveyance or other instrument, (3) long, peaceable and adverse possession. 15. Denial of the existence of a partnership. 16. Denial of the existence of a debt. 17. Denial of the execution or existence of a mortgage or other instrument.

¹ 14 Pet. 210.

² Redesdale (6th Am. ed.), 362, 365.

³ Rhode Island v. Massachusetts,
14 Pet. 210, and authorities cited.

⁴ Sharp v. Carlisle, 5 Dana (Ky),

488; Wyckoff v. Sniffin, 2 Edw. Ch.

518; Van Hook v. Whitlock, 2 Edw.

Ch. 304; McCabe v. Cooney, 2 Sandf.

Ch. 314; Redesdale (6th Am. ed.), 362.

18. Denial of plaintiff's title. 19. Laches. 20. Estoppel by deed. 21. Estoppel by matter *in pais* or equitable estoppel.

§ 314. Same—Equity rule 39.—A United States equity rule provides that: "The rule, that if a defendant submits to answer he shall answer fully to all matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration without notice may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such a plea."¹

By the provisions of this rule, according to its very terms, a defendant is at liberty to do by way of answer precisely what he might do by a plea in bar and an answer in support of such plea; and his obligation to make discovery is the same in both methods of defense. An answer presenting the class of defenses mentioned in the rule is made to follow the analogies of a plea in bar and an answer in support of such plea. Two conditions are necessary to entitle a defendant to the benefit of the rule, namely: (1) The defense insisted upon in his answer must be in bar of the whole bill and such a defense as he would "be entitled to avail himself of by a plea in bar;"² that is, a defense which reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to that part of it to which the plea applies.³ (2) The defendant in his an-

¹ Equity Rule 39.

² Equity Rule 39; *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173.

³ *Rhode Island v. Massachusetts*, 14 Pet. 210; *Farley v. Kittson*, 120 U. S. 303; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 49.

swer must "answer and discover" the matters which "he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense."¹ When the special bar is set up by plea, it is requisite to the validity of the plea that it contain averments negating the matters set up in the bill to avoid the bar, and that defendant make a full discovery of such matters in an answer in support of the plea; to state the rule concisely, the defendant must deny the matter set up to avoid the plea and must give all the discovery necessary to try the validity and truth of the plea;² and by the very terms of the equity rule under consideration the same principles govern when the bar is set up by answer.

§ 315. Same — Judicial construction of equity rule 39.—

A defendant, by setting up a special bar by way of answer, avoids the constructive admissions which he makes by interposing a plea in bar. When the defendant files a plea in bar to the whole bill, he thereby conclusively admits, for all the purposes of the suit, the truth of every allegation and charge in the bill which is not denied by the plea; this is a constructive admission, resulting from the nature of a defense by plea;³ but no constructive admission is made when the defense is set up by way of answer, and the burden is on the plaintiff to prove

¹ Equity Rule 39.

² *Bogardus v. Trinity Church*, 4 Paige Ch. 195; *Allen v. Randolph*, 4 Johns. Ch. 493; *Stearns v. Page*, 1 Story, 204, Fed. Cas. No. 13,339; *Everet v. Watts*, 10 Paige Ch. 82; *Clark v. Phelps*, 6 Johns. Ch. 214; *Sauzer v. De Meyer*, 2 Paige Ch. 574; *Harpending v. Reformed Dutch Church*, 16 Pet. 487; *Goodrich v. Pendleton*, 3 Johns. Ch. 384, 391; *Hughes v. Blake*, 6 Wheat. 453; s. c., 1 Mason, 515, Fed. Cas. no. 6,845; *Williams v. Lee*, 3 Atk. 223; *Roche v. Morgell*, 2 Sch. & Lef. 721; *Bolton v. Gardner*, 3 Paige Ch. 273; *Chappedelaine v. Deche-neaux*, 4 Cranch, 306; *Lonsdale v. Littledale*, 2 Ves. Jun. 451; *Chicot v.*

Lequesne, 2 Ves. Sen. 315; *Kampshire v. Young*, 2 Atk. 155; *Alardes v. Campbell*, Bunb. 265; *Harris v. Ingledew*, 3 P. Wms. 94; *Price v. Price*, 1 Vern. 185; *Radford v. Wilson*, 3 Atk. 815; *Jared v. Saunders*, 4 Bro. C. C. 322.

³ *Kennedy v. Creswell*, 101 U. S. 641, 646; *Dows v. Michael*, 2 Paige Ch. 345; *Bell v. Woodward*, 48 N. H. 444; *Bagley v. Adams*, 6 Ves. 594; *Wood v. Strickland*, 2 Ves. & Beam. 158; *Brownsword v. Edwards*, 2 Ves. Sr. 243; *Hawtry v. Trollop*, Nelson, 119; *Wigram on Discovery*, 36; *Langdell's Eq. Pl.*, secs. 98, 147; *Redesdale* (6th Am. ed.), 353; *Beames' Pleas in Equity*, 325.

every allegation and charge of his bill not expressly admitted by the defendant upon the record;¹ and this general rule of equity pleading is not changed by United States equity rule 39.² In the case³ last cited the plaintiff filed a bill to recover certain real property, and called upon defendants for discovery; the defendants, by way of answer, set up title by prescription, in bar of the whole bill, and failed to make the discovery required by the plaintiff. The answers were excepted to for insufficiency, and Justice Bradley, in overruling the exceptions, said: The defendants, to obviate the force of the exceptions to their answers, "refer to the thirty-ninth rule in equity, established by the supreme court of the United States, by which the well known rule of chancery pleading, that if a defendant submits to answer he shall answer fully to all matters of the bill, is abrogated in cases where the defendant might by plea protect himself from such answer and discovery; and in his answer sets forth the matter of such plea as a bar to the merits of the bill. The thirty-ninth rule declares that in such answer the defendant shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. The defendant claims that prescription is such a bar, and that, having set that up in their answer, they are excused from answering further.

"Under the old practice, if a plea were filed, and issue taken upon it, and that issue were decided in the complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. The new rule which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer. But this disadvantage is compensated for, in some degree, by the liability of the defend-

¹Brown v. Pierce, 7 Wall. 211; ²Gaines v. Agnelly, 1 Woods, 238,
Yung v. Grundy, 6 Cranch, 51; Fed. Cas. No. 5,173.

Brooks v. Byam, 1 Story, 296, Fed. ³Gaines v. Agnelly, *supra*.
Cas. No. 1,947.

ant to be called as a witness in the cause. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exceptions, where the answer sets up a bar to the whole bill, and claims the benefit of it, as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigency of the case. If the bar set up should be insufficient as such, I think the complainant would be entitled to except, as for want of full answer, and to avoid answering the exceptions, the defendant, in such case, would require leave of the court before he could amend the bar set up in answer. If, instead of excepting, the complainant should go to the proofs, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If, on the other hand, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree unless the answer admitted those allegations of the bill on which the prayer for relief was founded. These are the general rules which seem to me to govern pleadings in equity, as affected by the introduction of this new rule."

§ 316. Defendant's duty to make discovery.—It is a general rule in equity that every plaintiff is entitled to a discovery from the defendant of all the matters averred and charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a complete decree against the defendant, and to substantiate the proceedings, and make them regular and effectual; the plaintiff may require such discovery, either because he cannot prove the facts, or in aid of proof from other sources, and to avoid the expense of the examination of witnesses; and, therefore, it is the duty of the defendant to answer all the material allegations and charges of the bill, and all pertinent and material inter-

rogatories legitimately founded upon them.¹ In a suit for an account, an answer going no farther than to enable the plaintiff to go into the master's office is not sufficient; the plaintiff is entitled to the fullest information the defendant can give by the answer, not by long schedules, in an oppressive manner, but giving the best account he can, and stating that it is so, referring to books, so as to make them part of the answer, and giving the fullest opportunity for inspection.² It is not a sufficient foundation for an exception to an answer in equity that a fact charged in the bill is not answered, unless the fact is material, and might contribute to support the equity of the case of plaintiff, and induce the court to give the relief sought by the bill.³

§ 317. The manner in which the defendant must answer the bill.—“To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly, and without evasion, and must not merely answer the charges literally, but he must confess or traverse the substance of each charge; and where there are particular, precise charges, they must be answered particularly and precisely, though the general answer may amount to a full denial of the charges.”⁴ The material allegations in the bill of complaint ought to be answered, and admitted or denied, if the facts are within the knowledge of the defendant; and, if not, he ought to state what his belief is upon the subject, if he has any; and if he has none, and cannot form any, he ought to say so, and call upon the plaintiff for proof of the alleged facts, or waive that branch of the controversy.⁵ The usual requirement in the bill is that the defendant may, upon his oath, according to the best and utmost of his knowledge, recollection, information and belief,

¹ *Agar v. Regent's Canal Co.*, Cooper's R. 212; *Jerrard v. Saunders*, 2 Ves. 452; *Glengal v. Frazer*, 2 Hare, 99, 105; *Bank of Utica v. Messereau*, 7 Paige Ch. 517; *Mazarredo v. Maitland*, 3 Mad. 70; *Brereton v. Gamul*, 3 Atk. 241; *Cartwright v. Hateley*, 1 Ves. Jr. 292; *Shepherd v. Roberts*, 3 Bro. Ch. C. 239; *Brooks v. Byam*, 1 Story, 296, Fed. Cas. No. 1,947; *Davis v. Mapes*, 2 Paige Ch. 105; *Methodist Episcopal Church v. Jaques*, 1 Johns.

Ch. 65; *White v. Williams*, 8 Ves. 193; *Wood v. Merrell*, 1 Johns. Ch. 103; *Kittridge v. Claremount Bank*, 3 Story, 590, Fed. Cas. No. 7,858; *Brown v. Pierce*, 7 Wall. 211; *Redesdale* (6th Am. ed.), 357, 359.

² *White v. Williams*, 8 Ves. 193.

³ *Hardeman v. Harris*, 7 How. 726.

⁴ *Redesdale* (6th Am. ed.), 365, 366.

⁵ *Pierce v. Brown*, 7 Wall. 211; *Brooks v. Byam*, 1 Story, 296, Fed. Cas. No. 1,947.

full, true, direct, perfect and sufficient answer make to all and singular the several matters and things contained in the bill, and that as fully and particularly as if the same were again repeated, and he thereunto severally and distinctly interrogated.¹ If the defendant has any knowledge upon the matters of the bill, he should answer accordingly. If he has no knowledge, but has any information upon the matters of the bill, he is bound to answer in direct and unequivocal terms, as to the state of his mind, with regard to every fact stated in the bill, either that he does or does not believe the matters alleged, or that he cannot form any belief, or that he has no belief concerning them, and, if he is unable to form any belief as to any fact, he must call on the plaintiff to prove it, or he must admit it, or waive the controversy concerning it. And if the defendant states his belief of a fact, that amounts to an admission on his part of its truth, or that he does not intend to put it in issue as a matter of controversy in the case.² It is inconsistent with that reverence for truth which is required from those who answer upon oath, as well as with the rules of pleading, for a defendant to express himself obscurely in his answer, and leave to the court the task of divining his meaning. Whenever this course is pursued, the court adopts the construction of the language which is strongest against him.³ Where a plaintiff in his bill directly charged upon defendant that he made and entered into a certain agreement, a simple denial by defendant in his answer, according to his recollection and belief, was held insufficient, and treated as a mere evasion; he was bound to make a positive and direct denial.⁴ If a fact be charged which is in the defendant's own knowledge, he must answer positively, and not to his remembrance or belief; and as to facts not within his knowledge, he must answer as to his information and belief, and not to his information and hearsay merely, without stating his belief one way or the other.⁵ Where a defendant is answering as to his own acts, or as to other matters either known to him or charged in the bill to be within his personal

² Daniell, 246.

⁴ Taylor v. Luther, 2 Sumn. 228,

² Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 13,796.

Cas. No. 1,947.

⁵ Woods v. Morrell, 1 Johns. Ch.

³ Bailey v. Wilson, 1 Dev. & Bat. 103.
Eq. Cas. (N. C.) 187.

knowledge, he must answer the substance of each charge distinctly and separately.¹ Where the bill alleges the acts of the defendant, he must answer positively, and not merely as to his remembrance and belief.² The defendant is bound to deny or admit all the facts stated in the bill, with all their material circumstances, without special interrogatories for that purpose.³ The general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly and without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty; and particular, precise charges must be answered particularly and precisely, and not in a general manner, even though the general answer may amount to a full denial of the charges.⁴ A defendant is not required to answer an interrogatory which is not founded on some allegation or charge in the bill.⁵ When a defendant answers that he has not any knowledge or information of a fact charged, he answers sufficiently, and is not bound to declare his belief; he is not to be supposed to have any belief one way or the other. The rule requiring the defendant to state his belief applies only when he states a fact upon information and hearsay; in such case he must add his belief or disbelief of the report or information. But when he has neither knowledge nor information as to the facts stated by the plaintiff, he is not bound to state his belief. It would be very unreasonable to compel a defendant, who knows nothing and has heard nothing on the subject, except from the plaintiff's bill, to declare what his belief is of the plaintiff's veracity. It is sufficient for him to say that he does not know, nor has he heard or been informed of, the facts charged in the bill, save by the bill itself; and that he therefore leaves the plaintiff to make proof of his allegations and charges as he shall be advised.⁶ The plaintiff is entitled to an answer to every fact charged in the bill, the admission or proof

¹ *Utica Ins. Co. v. Lynch*, 3 Paige Ch. 210.

² *Slater v. Maxwell*, 6 Wall. 268, 277.

³ *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 61; *Bank v. Lynn*, 1 Pet. 376.

⁴ *Woods v. Merrell*, 1 Johns. Ch. 103.

⁵ *Bank v. Lynn*, 1 Pet. 376; *Bank v. Levy*, 3 Paige Ch. 606; *Grim v. Wheeler*, 3 Edw. Ch. 334.

⁶ *Morris v. Parker*, 3 Johns. Ch. 297; *King v. Ray*, 11 Paige Ch. 235.

of which is material to the relief sought, or to substantiate his proceedings and make them regular; although he might prove the fact by other testimony, if it is within the knowledge of the defendant, or is contained in books or papers in his possession or legally under his control, the plaintiff is entitled to his answer as to the fact, to save the expense of other proof.¹

§ 318. Defendants must seek information to enable them to give discovery.—“Where defendants have in their power the means of acquiring the information necessary to enable them to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them.”² It is the imperative duty of agents, trustees, executors, administrators, receivers, and all persons sustaining a fiduciary relation to property, to keep regular accounts of the trust estates confided to them, together with vouchers for all disbursements, and to be always ready with their accounts; and when a bill is filed against them for an account, it is their duty to examine all books, vouchers and papers in their possession or under their power, and in their answers to give full and complete information as to the state of their accounts; and such information should be given in an expeditious and intelligible manner, and not in an oppressive way, referring to books and vouchers, and affording to the plaintiff the fullest opportunity for inspection and examination; and if defendants have not all the information necessary, they are bound to seek for it, and, if practicable, to obtain it. He who, undertaking to give information, gives but half information, in the view of a court of equity conceals, and there is no difference between the *suggestio falsi* and the *suppressio veri*.³ When corporations are sued in equity, “it is their bounden duty, before putting in their answers, to cause every deed, paper and muniment in their possession or power to be diligently examined, and to give in their answer all the information which results from such examination,” and this rule “may, with propriety, be applied to all individuals who are required to answer a bill.”

¹ Davis v. Mapes, 2 Paige Ch. 105.

Pearse v. Green, 1 Jac. & W. 140, 141;

² 2 Daniell, 258.

Freeman v. Fairles, 3 Meriv. 43;

³ Morony v. Vincent, 2 Moll. 461;

Walker v. Symonds, 3 Swanst. 73;

Hardwicke v. Vernon, 14 Ves. 510,

White v. Williams, 8 Ves. 193.

511; White v. Lincoln, 8 Ves. 363;

⁴ 1 Daniell, 189; 2 Daniell, 258.

§ 319. Discovery of deeds, papers and documents.—The discovery which a court of equity compels is not confined to a discovery of facts resting merely in the knowledge of the defendant, but extends to a discovery of deeds, papers and writings of every description in his possession or power, the contents of which are material to the proof of the plaintiff's case; and the plaintiff may, in his bill, allege the existence of such deeds, papers and writings, and that they are material to the proof of his case, and that they are in the possession or power of defendant, and require him to set out in his answer the contents of such writings according to their purport and effect, or, if he pleases, in the very words and figures thereof; and then it becomes the duty of the defendant to disclose by his answer a full discovery of all such deeds, papers and writings as may be in his possession or power, and give a description of each, and state their contents; and, if it appears from the answer of defendant that such deeds, papers and writings, or any of them, are material to the proof of the plaintiff's case, he will be entitled to their production.¹

§ 320. Exceptions to the rule requiring defendant to make discovery.—There are some well-established exceptions to the rule requiring a defendant to give the discovery required by plaintiff in his bill. 1. He is not compellable to give any discovery which may subject him to a criminal accusation, or to any punishment, or which may tend to convict him of any crime, or which may subject him to a penalty or forfeiture, or to any loss in the nature of a forfeiture; and the exemption from discovery extends not only to the main criminating facts, but to every incidental fact which might form a link in a chain of evidence, which, if perfect, would establish the defendant's liability to the criminal accusation, or prosecution, or conviction, or punishment, or penalty, or forfeiture.² 2. He is

¹ *Atkins v. Wright*, 14 Ves. 211; *Watson v. Rennick*, 4 Johns. Ch. 381; *Wigram on Discovery*, 6-9, 29-41, 93; *Hare on Discovery* (2d Am. ed.), 212, 228, 229.

² *Wigram on Discovery*, 61-63; *Hare on Discovery*, 131-156; *Legett v. Postley*, 2 Paige Ch. 599; *Livingston v. Harris*, 3 Paige Ch. 528; *Taylor v. Bruen*, 2 Barb. Ch. 302; *Union Bank v. Barker*, 3 Barb. Ch. 358; *United States v. Saline Bank*, 1 Pet. 100; *Horsburg v. Baker*, 1 Pet. 232-236; *Greenleaf v. Queen*, 1 Pet. 188; *Entick v. Carrington*, 19 How. St. Tr. 1029; *Emery's Case*, 107 Mass. 172;

not compellable to make discovery of anything immaterial to the relief prayed by the bill.¹ 3. He is not compellable to discover privileged communications between attorney and client.² 4. He is not compellable to discover and produce his own title papers;³ but this exemption does not apply when the discovery sought is evidence for the plaintiff as well as for defendant, or tends to disprove the defense set up to the bill.⁴ 5. When a defendant sets up the defense that he is an innocent purchaser, whether by plea or answer, he is compellable to give the discovery necessary to try the validity and truth of the defense, and no more; and it seems that the same principle applies whenever the defendant sets up by answer any defense to the whole bill which could have been pleaded in bar.⁵

§ 321. Same—Manner of making objection to giving the discovery.—“A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.”⁷

§ 322. Effect of answer as evidence when it denies allegations of the bill.—Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the defendant, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts

Boyd v. United States, 116 U. S. 616-641; Lees v. United States, 150 U. S. 478-483; U. S. Const., 4th and 5th Amend.

¹ 2 Daniell, 55; Redesdale (6th Am. ed.), 226, Wigram on Discovery, 64-76; Hardeman v. Harris, 7 How. 726; Wiswall v. Wandell, 3 Barb. Ch. 312; Utica Ins. Co. v. Lynch, 3 Paige Ch. 210.

² 2 Daniell, 56, 61; Wigram on Discovery, 62, 63; Jones v. Pugh, 12 Sim. 470; Greenough v. Gaskell, 1 Mylne & K. 98.

³ 2 Daniell, 61-64; Wigram on Discovery (Second Proposition), 90-112.

⁴ 2 Daniell, 63, 64; Wigram on Discovery, 90-92.

⁵ Wigram on Discovery, 36-39; Chadwick v. Broadwood, 3 Beav. 540; Equity Rule 39.

⁶ Equity Rule 39; Gaines v. Agnelly, 1 Woods, 238, Fed. Cas. No. 5,173.

⁷ Equity Rule 44. This rule is a *verbatim* copy of the thirty-eighth of the English chancery orders of August, 1841.

and circumstances, which give to it greater weight than the answer, or which are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree, nor send the case to trial at law, but will simply dismiss the bill of complaint.¹ The qualifications of the rule, and the reason upon which it is based, are stated by Chief Justice Marshall as follows: "The general rule that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to the bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of the proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself."² The answer itself may contain the circumstances giving the greater credit to the plaintiff's one witness, sufficient to overcome the denials of defendant and to authorize a decree against him.³ Where it is

¹ *Badger v. Badger*, 2 Cliff. 137, 125 U. S. 247, 259; *Vigel v. Hopp*, 104 Fed. Cas. No. 718; *Hardway v. Eliot*, U. S. 441, 442; *Pember v. Mathers*, 1 Nat. Bank, 4 Cliff. 294, Fed. Cas. Brown Ch. 52; *Walton v. Hobbs*, 2 No. 6,273; *Clark's Ex'rs v. Van* Atk. 19; *Tobey v. Leonard*, 2 Wall. Riemsdyk, 9 Cranch, 160; *Hughes v.* 423, 440.
² *Clark's Ex'rs v. Van Riemsdyk*, 9 Blake, 6 Wheat. 453; *Hughes v. Blake*, Cranch, 160.
³ *East India Co. v. Donald*, 9 Ves. 1 Mason, 515, Fed. Cas. No. 6,845; Southern Development Co. v. Silva, 275.

alleged in the answer that the defendant is a stranger to the matters and things alleged in the bill, and that he could not answer concerning the same, because he has no information or belief upon the subject, the answer is not an admission of the allegations of the bill; nor does such an answer make it necessary for the plaintiff to introduce more than one witness to prove his bill.¹

§ 323. **Same — Tested by the rules of evidence.**—The principle upon which the positive, responsive denials of an answer on oath are allowed to prevail, unless overcome by two witnesses, or one witness and corroborating circumstances, is that the plaintiff, by calling on the defendant to answer the allegations of the bill on oath, makes him a witness, and his positive, responsive allegations under oath, respecting transactions and facts within his knowledge, become evidence; but the competency and weight of the responsive allegations of the answer as evidence must be tested by the general rules of law which govern and determine the competency and weight of evidence, and the credibility of witnesses; such answers are open to all the tests of truth to which a technical deposition or oral evidence may be subjected. When, therefore, the answer, though responsive, states facts not within the knowledge of the defendant, or the denials are not direct, positive and unequivocal, the answer is not evidence. Or if the facts are stated upon hearsay or information derived from others, or upon belief based upon such hearsay and information, or if the answer can be impeached by internal evidence, as that it is so inconsistent, contradictory and incredible within itself as to deprive it of the character of a fair answer, or that the facts and circumstances stated in the answer show that the allegations therein relied on by defendant to defeat the bill are inconsistent with truth, the answer will not be received as evidence. A defendant may affirm a fact to be true and yet, by a statement of other facts and circumstances, show that it is without any foundation in truth. Such answers are regarded merely as a pleading denying the allegations of the bill, but they have no weight as evidence.²

¹ *Pierce v. Brown*, 7 Wall. 205.

206; *Adams v. Adams*, 21 Wall. 185;

² *Clark's Ex'rs v. Van Riemsdyk*, 9 Commercial Ins. Co. v. Union Ins. Cranch, 153; *Brown v. Pierce*, 7 Wall. Co., 19 How. 318; *Scammon v. Hob-*

§ 324. Answer is not evidence for defendant when it admits allegations of the bill and states new matter to avoid them.—When the defendant by his answer admits the facts stated in the bill, and states other facts in avoidance of them, and the plaintiff takes issue upon the answer by filing the general replication, the plaintiff is not required to prove his bill or that part of it which is so admitted; but the answer is not evidence in favor of the defendant to prove the new matter set up by him in avoidance, and such new matter must be established by independent proof to be of any avail as a defense. The rule on this subject is thus stated by Chancellor Kent: When an answer is put in issue, what is confessed and admitted by it need not be proved; but where the defendant admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the fact so insisted on in defense. This has been fully recognized by the United States supreme court as the correct rule.¹ So far as an answer in equity sets up new facts by way of discharge or avoidance of the matter of the bill, or alleges separate and independent agreements, it is not evidence for the defendant; but all such allegations must be substantiated by proof *aliunde*.²

§ 325. Admissions made by defendant in his answer are conclusive.—Evidence procured from defendant by admissions in his answer is generally less expensive and often more convenient than if it were obtained from witnesses; and admissions which have been deliberately made by the defendant under oath for the purposes of the suit have the further ad-

son, Hask. 406, Fed. Cas. No. 12,434; Seitz v. Mitchell, 94 U. S. 580, 586; Stevens v. Post, 12 N. J. Eq. 408, 413; Clark v. White, 12 Pet. 178; McCoy v. Rhodes, 11 How. 181; Thompson v. Brown v. Buckley, 14 N. J. Eq. 294, v. Lambe, 7 Ves. 587; Green v. Hart, 1 299; Lawrence v. Lawrence, 21 N. J. Johns. (N. Y. Supr. Ct.) 580; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847.
Eq. 317, 318; Commercial Bank v. Reckless, 5 N. J. Eq. 650, 651; Fryrear v. Lawrence, 5 Gilm. (Ill.) 325; Deimel v. Brown, 27 N. E. R. (Ill.) 44; Knickerbocker v. Harris, 1 Paige Ch. 209; Town v. Needham, 3 Paige Ch. 546; East India Co. v. Donald, 9 Ves. 275.

¹ Hart v. Ten Eyck, 2 Johns. Ch. 62; Roach v. Summers, 20 Wall. 165; Clements v. Moore, 6 Wall. 299, 316; ² Randall v. Phillips, 3 Mason, 375, Fed. Cas. No. 11,555; Parteriche v. Pawlet, 2 Atk. 383; Brace v. Taylor, 2 Atk. 253; Ridgeway v. Darwin, 7 Ves. 587; Thompson v. Lambe, 7 Ves. 587; Kilpatrick v. Love, 2 Amb. 589; Blount v. Burrow, 1 Ves. Jr. 546; Robinson v. Scotney, 19 Ves. 583.

vantage of being conclusive; that is, such admissions act as an estoppel to the introduction of conflicting testimony. When, therefore, the defendant by his answer admits any fact alleged in the bill, such fact is no longer an issue in the case, and the defendant will not be permitted to offer any evidence to controvert his admissions.¹

§ 326. Answer of one defendant not evidence against co-defendant.—It is a general rule in equity that the admissions or statements in the separate answer of one or more defendants cannot be read in evidence to sustain the plaintiff's case against a co-defendant, unless such defendants stand in such a relation to each other that their admissions, not under oath, and out of court, would be evidence against each other, as where they are combined either legally or fraudulently, so as to create a unity of interest between them.² The confessions and admissions of partners, in relation to partnership transactions, are admissible in an action against each other; and upon this principle the answers of partners in relation to partnership concerns may be read in evidence against each other.³

§ 327. Setting cause down for hearing on bill and answer.—The plaintiff always has the option of setting the cause down for hearing upon bill and answer;⁴ but by doing so he makes a constructive admission of the truth of all matters well pleaded in the answer. When a suit in equity is set down for

¹ *Gresley's Eq. Ev.* 11, 457; *E. L. Co. v. Keightly*, 4 *Mad.* 16; *Deimel v. Brown*, 27 *N. E. R. (Ill.)* 44; *Insurance Co. v. Myer*, 93 *Ill.* 271; *Morgan v. Corliss*, 81 *Ill.* 72; *Roberts v. Roberts*, *Dick.* 573.

² *Christie v. Bishop*, 1 *Barb. Ch.* 105; *Dick v. Hamilton*, *Deady*, 322, *Fed. Cas. No.* 3,890; *Lenox v. Notrebe*, *Hempst.* 251, *Fed. Cas. No.* 8,246c; *Leeds v. Insurance Co.*, 2 *Wheat.* 380; *Clark v. Van Riemsdyk*, 9 *Cranch*, 156; *Grant v. United States Bank*, 1 *Cai. Cas. in Err.* 112; *Phenix v. Ingram*, 5 *Johns.* 412; *Hunt v. Stephenson*, 1 *A. K. Marsh.* 570; *Mosely v. Armstrong*, *T. B. Mon.* 288; *Graham v. Sublett*, 6 *J. J. Marsh.* 44; *Collier*

v. Chapman, 2 *Stewart's R. (Ala.)* 163; *Singleton v. Gayle*, 8 *Porter (Ala.)*, 270; *Winters v. January*, *Litt. Sel. Cas.* 13; *Dale v. Madison*, 5 *Leigh*, 401; *Daniell v. Ballard*, 2 *Dana (Ky.)*, 29; *Hardin v. Baird*, *Litt. Sel. Cas.* 340; *Jones v. Tuberville*, 2 *Ves.* 11; *Morse v. Royal*, 12 *Ves.* 356; *Mills v. Gore*, 2 *Pick.* 28; *Chapin v. Coleman*, 11 *Pick.* 331; *Wych v. Meal*, 3 *P. Wms.* 311; *Van Riemsdyk v. Kane*, 1 *Gall.* 630, *Fed. Cas. No.* 16,872.

³ *Wood v. Braddick*, 1 *Taunt.* 104; *Van Riemsdyk v. Kane*, 1 *Gall.* 630, *Fed. Cas. No.* 16,872.

⁴ *Equity Rule* 60; *Reynolds v. Crawfordville Bank*, 112 *U. S.* 409; *Banks v. Manchester*, 128 *U. S.* 244, 254.

final hearing on bill and answer, upon that hearing the material allegations of the answer are taken as true in all points, and the allegations of the bill which are not admitted by the answer are to be taken as untrue. The setting the cause down for hearing on bill and answer is in effect a submission of the cause to the court by the plaintiff, on the contention that he is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer.¹

§ 328. Effect of answer as evidence when oath is waived. "If the complainant, in his bill, shall waive an answer under oath, or shall require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such parts thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause shall be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of congress of July 2, 1864."² When an answer on oath is waived, the plaintiff may avail himself of any admissions and allegations in the answer which go to establish the case made by the bill, but such answer is not evidence in favor of the defendant for any purpose,³ except when the case is set down for hearing on bill and answer only.⁴

§ 329. The rule determining what allegations in the answer are responsive.—Inasmuch as the responsive allegations in the answer which admit the case made by the bill or any part of it are conclusive evidence in favor of the plaintiff, and

¹ Reynolds v. Crawfordville Bank, 112 U. S. 409; Banks v. Manchester, 128 U. S. 244, 254; Leeds v. Insurance Co., 2 Wheat. 380; Brinkerhoff v. Brown, 7 Johns. Ch. 218; Grosvenor v. Cartwright, 2 Ch. Cas. 21; Barker v. Wyld, 1 Vern. 140; Perkins v. Nichols, 11 Allen, 542; Dale v. McEvers, 2 Cow. 118; Lord Bacon's Orders 64; U. S. Equity Rule 41.

² Equity Rule 41.

³ Patterson v. Gaines, 6 How. 584; Bank v. Geary, 5 Pet. 99; Bartlett v. Gale, 4 Paige Ch. 503; Symmes v. Strong, 1 Stew. Eq. 131; Reed v. Cumberland Ins. Co., 36 N. J. Eq. 393, 396.

⁴ Equity Rule 41.

the responsive allegations in the answer which deny the case made by the bill or any part of it are evidence in favor of defendant, requiring two witnesses, or one witness and corroborating circumstances, to overcome them, and the allegations in the answer setting up new matter in avoidance are not evidence in favor of defendant, it has, therefore, always been a matter of great importance to distinguish between those allegations of the answer which are responsive to the bill and those allegations which are not responsive to the bill, but which set up new matter in avoidance and discharge; and there has been much discussion as to the rule which should control the matter, and especially in cases where the plaintiff has sought to read in evidence the admissions of a defendant in his answer, without reading and being bound by those allegations of the answer which, in connection with the admissions, set up matters in defense and discharge. It would seem from an examination of the authorities that the rule upon the subject is this: If the matters alleged in the bill which are admitted by the answer, and the matters alleged in the answer in defense and discharge of the defendant, arise out of the same agreement or transaction, so as to constitute one whole, connected matter, and which is, by fair and reasonable construction, wholly embraced within the subject-matter of the bill and the discovery required by it, then, in such case, the matters alleged in defense and discharge, as well as the admissions, are responsive to the bill, and the plaintiff cannot read in evidence the admissions without also reading the matters alleged in the answer in defense and discharge of the defendant; but if the matters alleged in the bill which are admitted in the answer, and the matters alleged in the answer in defense and discharge of the defendant, arise out of separate and distinct agreements or transactions, and do not constitute one whole, connected matter, and the matters alleged in defense and discharge cannot, by fair and reasonable construction, be considered as embraced within the subject-matter of the bill and the discovery required by it, then in such case the matters alleged in defense and discharge are not responsive to the bill, and, therefore, are not evidence in favor of the defendant, and his admissions may be read in evidence by the plaintiff, without being affected by the

matters alleged in the answer in defense and discharge.¹ Lord Hardwicke said: "If a man admit by his answer that he received several sums of money at particular times, and states that he paid away those sums at other times in discharge, he must prove his discharge."²

§ 330. When answer of one defendant inures to the benefit of his co-defendant.—Where the plaintiff in his bill alleges a joint liability or a joint and several liability against several defendants, or where the bill alleges the same state of facts as a ground of relief against all of several defendants, if one of the defendants makes default, his default and a formal decree *pro confesso* may be entered against him; but no final decree on the merits can be made against him until the case is disposed of as to the other defendants; and if the other defendants answer, denying the allegations which constitute the equities of the bill, and the plaintiff fails upon the proof, such answer will inure to the benefit of all the defendants, and the bill will be dismissed on the merits as to the defendant in default as well as to those who have answered.³

¹ Hart v. Ten Eyck, 2 Johns. Ch. 62; Talbot v. Rutledge, 4 Bro. 74; McCoy v. Rhodes, 11 How. 141; Napier v. Elam, 6 Yerger, 112; Thompson v. Lambe, 7 Ves. 587; Bartlett v. Gildard, 3 Russ. 157; Ormund v. Hutchinson, 13 Ves. 47; Rude v. Whitchurch, 3 Sim. 562; Nurse v. Bunn, 5 Sim. 225; Meritt v. Brown, 19 N. J. Eq. 286; Beals v. Illinois M. & T. R. Co., 133 U. S. 290, 295; Robinson v. Scotney, 19 Ves. 582; Bellows v. Stone, 48 N. H. 435; Blunt v. Burrow, 4 Bro. C. C. 75; Schwartz v. Wendell, Walk. Ch. 267; Cooper v. Tappan, 9 Wis. 361; Dunham v. Jackson, 6 Wend. 22; Eberly v. Goff, 9 Harris, 251; Pusey v. Wright, 7 Casey, 387; Eaton's Appeal, 66 Pa. St. 483.

² Talbot v. Rutledge, 4 Bro. 74.

³ Frow v. De La Vega, 15 Wall. 552, 554; Butler v. Kinzie (Tenn.), 15 S. W. R. 1068; Salmon v. Smith, 58 Miss. 399, 409, 410; Minor v. Stewart, 2 How. (Miss.) 912; Hargrove v. Mar-

tin, 6 Smedes & M. (Miss.) 61; Ligan v. Henderson, 1 Bland, 261; Clason v. Morris, 10 Johns. 524; Andres v. Lee, 1 Dev. & Bat. Eq. (N. C.) 319, 321; State v. Columbia, 12 S. C. 370; Petty v. Hannum, 2 Humph. 102; Hennessee v. Ford, 8 Humph. 500; Cherry v. Clements, 10 Humph. 552; Caldwell v. McFarland, 11 Lea, 467; Smith v. Cunningham, 2 Tenn. Ch. 573; Phillips v. Hallister, 2 Cold. 72.

"I believe not a case can be found in which it is insinuated that where there are two defendants having a joint interest and one appears and answers, and disproves the plaintiff's case, that the plaintiff can have a decree against the other who had made default, and against whom the bill was taken *pro confesso*. It would be unreasonable to hold that because one of the defendants had made default the plaintiff should have a decree even against him, when the court is satisfied, from the proofs

§ 331. **Answers in patent suits.**—The United States Revised Statutes, as amended by act of congress of March 3, 1897, provided that the defendant in any suit in equity for relief against an alleged infringement of a patent may set up in his answer the following defenses, and also give notice of the proof thereof in his answer, namely:

“*First.* That for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative

offered by the other, that in fact the plaintiff is not entitled to a decree. Though I have not met with a case in equity to the point, yet, pursuing the analogy between proceedings at law and in equity, we are not without very clear authority; for it is a well-settled principle of law, that in actions upon contract the plea of one defendant inures to the benefit of all; for, the contract being entire, the plaintiff must succeed upon it against all or none; and, therefore, if the plaintiff fails at the trial upon the plea of one defendant he cannot have judgment against those who let judgment go by default.” Spencer, Justice, in *Calson v. Morris*, 10 Johns. 524 (March, 1812). “If Stewart was the sole defendant, or his rights depended on distinct facts, his default in appearing and answering would have been an admission of the facts charged in the bill. But it would be unwarrantable to hold that, because one of the defendants had made default, the plaintiff should have a decree against him, when the court is satisfied from the facts presented by the others that the plaintiff is not entitled to a decree.” Pray, Justice, in *Minor v. Stewart*, 2 How. (Miss.) 912 (Jan., 1838). “Where a claim is against two jointly, and one suffers the bill to be taken *pro confesso*, and the other sets up a defense which defeats the claim altogether, what disposition of the cause is to be made as against him who makes no resist-

ance? We believe that from analogy to the doctrine which prevails at law in similar cases, . . . and because of the obvious equity of such a course, we are bound to hold that the defense must inure to the benefit of all defendants having a joint interest in the subject-matter.” Gaston, Judge, in *Andres v. Lee*, 1 Dev. & Bat. Eq. (N. C.) 319, 321 (June, 1836). “We think that where a joint defendant answers a bill, and by proof removes the matter of equity set up against himself and the other defendants, who do not answer, there can be no decree against the defendant so failing to answer. The rule would be different if the bill were to allege a distinct matter of equity against the party failing to appear.” Green, Justice, in *Hennessee v. Ford*, 8 Humph. 499, 501 (Dec., 1847). “The settled doctrine of this court is that when one of several defendants makes default, followed by a *pro confesso*, and others defend, and it appears from their defense that, on the whole case, the complainant is not entitled to succeed, he will not be allowed to do so even against him who made default. The principle supporting this rule is that the complainant must show himself entitled to relief or he shall not have it, and it matters not which of those whom he calls on to defend may show that his complaint is groundless.” Campbell, Justice, in *Salmon v. Smith*, 58 Miss. 409, 410 (1880).

to his invention or discovery, or more than is necessary to produce the desired effect; or,

“*Second.* That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

“*Third.* That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or,

“*Fourth.* That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

“*Fifth.* That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.”¹

In order to maintain a suit in equity for the infringement of a patent, the plaintiff must allege and prove two things, namely: (1) that he or the person under whom he claims was the original and first inventor of the patented improvement; (2) that it has been infringed by the party against whom the suit is brought. If the thing patented is an entirety, and incapable of division or of separate use, the defendant, desiring to interpose the statutory defenses, must address them to the invention as a whole, and not to a part of it, or to one or more claims of the patent, if they are less than the entire invention.² More than one patent may be included in one suit, and more than one invention may be secured in the same patent, in which case the several defenses may be made to each patent in the suit, and to each invention to which the charge of infringement relates.³ An allegation in an answer that the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement.⁴

¹ U. S. R. S., sec. 4920, amended by act of congress of March 3, 1897, 29 U. S. Stat. at L., ch. 391, sec. 2, p. 692.

³ Bates v. Coe, 98 U. S. 31, 48; Parks v. Booth, 102 U. S. 96, 107.

⁴ 29 U. S. Stat. at L., ch. 391, sec. 2, p. 692; Agawam Woolen Co. v. Parks v. Booth, 102 U. S. 96, 107.

§ 332. **Same — Notice of proof and decree.**—The statute further provides that: "And in notice as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it has been used; and if any one or more of the special matters alleged shall be found for defendant, judgment shall be rendered for him with costs."¹ The statute requiring notice was not intended to apply to cases where the alleged invention is not patentable; the court will take notice of that fact.² Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject; it consists of proof of what was old and in general use at the time of the alleged invention, and is received for three purposes, and none other, namely: (1) to show what was the old, (2) to distinguish what was new, and (3) to aid the court in the construction of the patent.³ Evidence of the statutory defenses in a suit at law is not admissible without giving the notice required by the statute, and the settled practice in equity is to require the defendant, as a condition precedent to such defenses, to give the plaintiff the same notice and information in his answer,⁴ and, indeed, the defendant is required by the express terms of the statute to give such notice in his answer.⁵ Prior use and knowledge of the thing patented may be pleaded as a defense to a suit for infringement; but the defendant cannot be allowed to give evidence to support such defense if seasonable objection be made, unless it appears that he gave notice in his answer of the names and residences of the persons alleged to have had such prior knowledge of the thing patented.⁶ It seems to be settled that the true construction of the act of congress is that only the names of those who had invented or used the antici-

Jordan, 7 Wall. 583, 610; Reed v. Cutter, 1 Story, 599, Fed. Cas. No. 11,645.

¹ 29 U. S. Stat. at L., ch. 391, sec. 2, p. 692.

² Brown v. Piper, 91 U. S. 37, 44.

³ Brown v. Piper, 91 U. S. 37, 44.

⁴ Agawam Woolen Co. v. Jordan, 7 Wall. 583, 610; Bates v. Coe, 98 U. S. 31, 50.

⁵ U. S. R. S., sec. 4920; 29 U. S. Stat. at L., ch. 391, sec. 2, p. 692.

⁶ Roemer v. Simon, 95 U. S. 214, 231; Blanchard v. Putnam, 8 Wall. 420.

pating device or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded in the answer; this is all that is necessary to protect a patentee against surprise, and he need not be informed by the answer who are to testify in regard to the invention or use.¹

§ 333. Same — Defense that device is not patentable.—The statutory defenses are not the only defenses which may be made to a bill in equity for the alleged infringement of a patent. Where the commissioner of patents, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no principle which prevents a party, sued for its infringement, from availing himself of its legality, independently of any statutory permission so to do. A valid defense not given by statute is that the thing patented is not a patentable invention, and, being a question of law, the courts are not bound by the decision of the commissioner of patents.² If, from any cause, the patent is void on its face, the defendant may avail himself of that defense without setting it up in his answer; and the objection that the patent is for a thing which is not a patentable invention falls within this class of defenses.³ In a case before the supreme court the plaintiff claimed that it was unfair to him to allow the defendant to avail himself of the defense that the patent was void without having set it up in his answer, and the court, upon a review of the decided cases upon the point which sanctioned the practice, said: "We think the practice thus sanctioned is not unfair or unjust to complainants in suits brought on letters patent. If letters patent are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground, whether the defense be made or not. It would ill become a court of equity to render money decrees in favor of a complainant for the infringement of a patent which the court could see was void on its face for want of invention. Every suitor in a cause founded on letters patent should therefore

¹ Woodbury Planing Machine Co. v. Keith, 101 U. S. 479, 494; Roemer v. Simon, 95 U. S. 218.

² Hahn v. Harwood, 112 U. S. 354, 369.

³ Hahn v. Harwood, 112 U. S. 354,

369; Slawson v. Grand Street R. Co., 107 U. S. 649, 655; Dunbar v. Myers, 94 U. S. 187; Brown v. Piper, 91 U. S. 44; Hendy v. Golden State & Miners' Iron Works, 127 U. S. 370, 376.

understand that the question whether his invention is patentable or not is always open to the consideration of the court, whether the point is raised by the answer or not.”¹ When the invention is simply the application by the patentees of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any new idea which could be deemed new and original in the sense of the patent law, it is not patentable; and no one can lawfully appropriate to himself and exclude others from using it in any usual way for any purpose to which it may be desired to apply it.²

§ 334. Procedure to compel an answer.—The slow and oppressive procedure of the English practice³ for compelling an appearance and answer is not followed in the courts of the United States, but, in its stead, a simple, speedy and effectual procedure is established by the United States equity rules. Under the procedure provided by those rules, if the defendant shall fail to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; or if he shall fail to file his plea, demurrer or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance; or if, upon overruling defendant's plea or demurrer, he shall fail to file his answer to the bill on the next succeeding rule-day, or at such other time as the court by its order may direct; or if, when the plaintiff files an amended bill, the defendant shall fail to file a new or supplemental answer on or before the next succeeding rule-day, or at such other time as the court may direct; or if, upon an allowance by the court of exceptions for insufficiency to the answer of defendant, he shall fail to put in a full and complete answer thereto on the next succeeding rule-day, the bill may be taken *pro confesso*, and the cause be proceeded in *ex parte*; but, upon sustaining exceptions for insufficiency, the order *pro confesso* will extend only to the matters of the bill covered by the exceptions; or in all these cases the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall

¹Slawson v. Grand Street R. Co., 107 U. S. 649, 655. Slawson v. Grand Street R. Co., 107 U. S. 649, 655.

²Brown v. Piper, 91 U. S. 37, 44; ³1 Smith's Ch. Pr. 137-151, 167-198; 1 Daniell, 572-700; 2 Daniell, 10-16.

be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.¹ The process of attachment cannot issue against a defendant until after he has been duly served with a writ of subpoena and has made default;² but after default the plaintiff is entitled to issue the writ without any order of the court or a judge, or an affidavit of any kind,³ and it is served by the marshal of the district or his deputy, or by some other person especially appointed by the court for that purpose.⁴

§ 335. Same — When nominal party need not appear.—

“Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill unless the plaintiff specially requires him so to do by the prayer of the bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of the proceedings against him, unless the court shall otherwise direct.”⁵

§ 336. The form of an answer.—“An answer is headed by a title, the answer of A. B., the defendant, to the bill of complaint of C. D., complainant. If two or more defendants join in the same answer, it is entitled the joint and several answer, unless it be the answer of a man and his wife, in which case it is called the joint answer. The answer of an infant, or other

¹ Equity Rules 7, 12, 17, 18, 34, 46, 64; *Thompson v. Wooster*, 114 U. S. 104-120; *Suydam v. Beals*, 4 McLean, 12, Fed. Cas. No. 13,653; *Hall v. Cont. Life Ins. Co.*, 20 Fed. R. 344.

² 1 Smith's Ch. Pr. 136; 1 Daniell, 572; Equity Rules 7, 12, 13, 17, 18.

³ 1 Smith's Ch. Pr. 167; 1 Daniell, 578; Equity Rule 18.

⁴ Equity Rule 15; U. S. R. S., secs. 787, 922.

⁵ Equity Rule 54.

person answering by guardian, or of an idiot or lunatic answering by his committee, is so entitled.”¹ “An answer usually begins by a reservation to the defendant of all advantage which may be taken by exception to the bill, a form which has probably been intended to prevent a conclusion that the defendant, having submitted to answer the bill, admitted everything which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea.’ The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow, with a general denial of that combination which is usually charged in a bill. It is the universal practice to add by way of conclusion a general traverse or denial of all the matters charged in the bill. This is said to have obtained when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though perhaps rather impertinent if the bill is otherwise fully answered, and it has been determined in that case to be unnecessary, it is still continued in practice. In the case of an infant the answer is expressed to be made by his guardian; and the general saving at the beginning, together with the denial of the combination and the traverse at the conclusion, common to all other answers, are omitted; for an infant is entitled to the benefit of every exception which can be taken to a bill without expressly making it; he is considered as incapable of the combination charged in the bill, and his answer cannot be excepted to for insufficiency. The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the court to defend the suit. An answer must be signed by counsel, unless taken by commissioners in the country under the authority of a commission issued for the purpose, in which case the signature by counsel is not required, the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant, which in fact was formerly done.”²

¹2 Daniell, 266.

² Redesdale (6th Am. ed.), 373-376.

§ 337. **Signature and oath of defendant.**—The general rule requires that, before an answer can be filed, it should be signed by all the defendants whose answer it is, and they should swear to the truth of its contents;¹ but the plaintiff may in his bill waive an answer under oath, or may require an answer under oath with regard to certain specified interrogatories,² or he may dispense with the oath and signature of all or any of the defendants.³ Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory,⁴ or before any notary public.⁵ The form of the oath administered to the defendant on putting in his answer is: "You swear (or solemnly affirm) that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that which relates to the act and deed of any other persons, you believe to be true."⁶

§ 338. **Answer by a married woman.**—"If a wife joins in one defense with the husband relative to her own property, it is considered the defense of the husband; but under certain circumstances the wife is at liberty to put in a separate answer. A wife is entitled to put in an answer separate from her husband on three grounds: (1) If the husband and wife are made defendants in the right of the wife. (2) If the husband and wife live separate and apart. (3) If the husband is out of the jurisdiction. An order must be obtained for liberty to answer separate, which is granted upon a motion or petition as of course upon any of the grounds above mentioned, and not only extends to answering separate, but to plead or demur separate. If a husband files a bill against his wife, he admits her to be a *feme sole*, and she is at liberty to put in her answer as such. If a married woman, who is under age, answers separate from her husband, she must answer by guardian. . . . When a hus-

¹ 1 Smith's Ch. Pr. 265; 2 Daniell, 269, 270; Bailey Washing Machine Co. v. Young, 12 Blatchf. 199, Fed. Cas. No. 75; Denison v. Bassford, 7 Paige Ch. 370.

² Equity Rule 41.

³ 1 Smith's Ch. Pr. 265, 266.

⁴ Equity Rule 59.

⁵ 19 U. S. Stat. at L., ch. 304, p. 206.

⁶ 2 Daniell, 270.

band and wife are defendants, the latter obtaining an order to answer separately from her husband is entitled to the full time allowed to answer, and is not bound by the previous time allowed to her husband for that purpose on behalf of himself and her. Where husband and wife are defendants, and by the death of the husband a new interest arises to the wife, the suit becomes defective and a supplemental bill is necessary, and she is not bound by the answer put in during the coverture. . . . If a female defendant marries after the institution of a suit, and before answer, she answers jointly with her husband, unless an order is obtained for the wife to answer separate, and if the husband neglects to answer, an attachment may issue against him.”¹

§ 339. Answer by an infant.—In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court. They defend by guardian, to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the matter in question. And it is contrary to the most approved usage for the court to appoint for infant defendants, as their guardian *ad litem*, to defend for them, a person suggested by adversary counsel, not shown by the record to be related to them; and it is error for the court to render a decree for plaintiffs, against infant defendants, upon admissions made by the guardian *ad litem*, in the answer filed by him, without proof of the allegations of the bill; infant defendants are incapable in law of admitting the facts upon which the plaintiff rests his claim to relief, and their guardian *ad litem* cannot make such admissions for them.² “It was the duty of the court, where the bill on its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *feme covert*, and no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose. If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was the more imperative that the court

¹ 1 Smith’s Ch. Pr. 252, 253.

² Bank of U. S. v. Ritchie, 8 Pet. 128, 144.

should have appointed some one to do it.”¹ No proceeding can be had against an infant defendant after service of subpoena, until a guardian *ad litem* has been appointed for him, to protect his interest.² In the appointment of a guardian *ad litem* for infant defendants, the court should always select such person for that purpose as will be most likely to protect the rights of the infants; and where the father or other natural guardian and protector of the infants is himself the plaintiff in the suit, the next nearest relative of the infants is entitled to be heard on the selection of a proper guardian *ad litem* to defend the suit.³ The court never selects a guardian *ad litem* for an infant defendant on the nomination of the adverse party. It is frequently necessary for the guardian seriously to contest the plaintiff’s claim. It is his duty in every case to ascertain from the infant and his friends, or from other proper sources of information, what are the legal and equitable rights of his ward. And if a special answer is necessary or advisable, for the purpose of bringing the rights of the infant properly before the court, it is his duty to put in such an answer. If the infant is a mere nominal party, or has no defense against the plaintiff, and no equitable rights against his co-defendants, which render a special answer necessary, the general answer will be sufficient. If the infant has any substantial rights which may be injuriously affected by the proceedings in the cause, or if the claim against him is of a doubtful character, it is also the duty of his guardian *ad litem* to attend before the court on the hearing, on the taking of testimony in the cause, on reference to the master, and on all proper occasions, to bring forward and protect the rights of his ward. And if the guardian neglects his duty, in consequence of which the rights of the infant are not properly attended to, or are sacrificed, he may be punished for his neglect. . He will also, in such case, be liable to the infant for all damages he may sustain. Although it is the duty of the court to protect the rights of infants, when they are properly before it, so that they may be seen and fairly understood, yet it is the special duty of the guardian *ad litem* to bring those rights directly under the consideration of the chan-

¹ O’Hara v. McConnell, 93 U.S. 150, 155.

³ Grant v. Van Schoonhoven, 9 Paige Ch. 255.

² Larkin v. Mann, 2 Paige Ch. 27.

cellor for his decision thereon. This being the duty of the guardian, it would be improper, in any case, to permit the plaintiff to name the person who is to resist his claim against the infant.¹

§ 340. Same — Method of appointing guardian *ad litem*.

According to the English practice, there were three methods of appointing a guardian *ad litem*, namely: (1) After an infant was served with subpoena, if in a town cause, he and the party intended to be appointed guardian might voluntarily appear in court, either in term time or in vacation, and by his clerk in court move in writing for the appointment; and if upon examination it appeared that the person offering himself was a proper person, the appointment was made. (2) If the infant did not appear, on affidavit of service of the subpoena, an attachment issued against him, which, however, was never in fact executed; but counsel for the plaintiff moved, upon the attachment, for an order for a messenger to bring the infant into court, and when he was brought in, the court assigned him a guardian. (3) If the infant lived in the country, the court, upon an *ex parte* motion or petition, made an order of course that a commission should issue for the appointment of a guardian; and the commission issued, naming the commissioners, two of whom had the power to make the appointment, upon the infant being personally produced before them, and it appearing upon inquiry that the person proposed as guardian was a proper person; and after making the appointment the commission was returned into court executed.² A United States equity rule provides that: "Guardians *ad litem* to defend a suit may be appointed by the court, or any judge thereof, for infants or other persons who are under guardianship or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons."³ When a guardian *ad litem* is to be appointed, either the infant or plaintiff's counsel may make the application

¹ Knickerbocker v. De Freest, 2 Pr. 254-259; Bank of U. S. v. Ritchie, Paige Ch. 305. 8 Pet. 128, 144.

² 1 Daniell, 229-233; 1 Smith's Ch. ³ Equity Rule 87.

either in term time, at rules, or in vacation, by motion or petition to the court, or a judge thereof, and upon an inquiry as to the proper person to appoint, the order will be made; the order being only interlocutory and grantable of course, and necessary to speed the cause, it may be made in vacation as well as in term time.¹

§ 341. Answer of idiots and lunatics.—If a person found a lunatic by inquisition is made a defendant to a bill, his committee must be made a co-defendant jointly with him, and he answers by such committee, and no order is necessary for the purpose; but if the idiot or lunatic has no committee, or his committee has an adverse interest to that of the person whose estate is intrusted to his care, an order will be made appointing a guardian *ad litem* to defend the suit, and the application may be made by either the plaintiff, or on behalf of the lunatic defendant.² If a person is by age or infirmities reduced to a second infancy, the court will appoint a guardian *ad litem* to defend the suit against him.³ The United States equity rule which authorizes the court or any judge thereof to appoint a guardian *ad litem* for infants, embraces all persons who, from any cause whatever, are incapable of defending suits against them, and places the rights and interests of all such persons fully under the protection and control of the court.⁴

§ 342. Answer of corporation.—“Where a suit is instituted against a corporation sole, he must appear and defend, and be proceeded against in the same manner as if he were a private individual. But where corporations aggregate are sued in their corporate capacity, they must appear by attorney, and answer under the common seal of the corporation; but if those of whom the corporation consists be charged as private individuals, they must answer upon oath.” A corporation aggregate cannot be attached, but is compelled to appear and answer by writs of *distringas* and sequestration.⁵

¹ Equity Rules 1-5; U. S. R. S., sec. 918; 1 Daniell, 231.

² 1 Smith's Ch. Pr. 259, 260; 1 Daniell, 219, 220; Wilson v. Grace, 14 Ves. 172; Howlett v. Wilbraham, 5 Madd. 423; Copous v. Kauffman, 3 Edw. Ch. 370; Montgomery v. Montgomery, 3 Barb. Ch. 132.

³ Redesdale (6th Am. ed.), 124; 1 Daniell, 248; Wilson v. Grace, 14 Ves. 172; Re Barker, 2 Johns. Ch. 233; Markle v. Markle, 4 Johns. Ch. 168.

⁴ Equity Rule 87; O'Hara v. McConnell, 93 U. S. 150.

⁵ 1 Daniell, 189, 190.

§ 343. Amending answer and filing supplemental answers.

By the ancient practice of the High Court of Chancery of England, where there was in the answer of a defendant a clear mistake in stating a fact or admitting a fact stated in the plaintiff's bill, resulting from inadvertence or misapprehension or ignorance of the facts or the misleading conduct of the plaintiff, the defendant was permitted to correct such mistake by amending his answer; and the mistake was corrected by taking the first answer off the file and filing a new answer in which the facts were correctly stated, or the improper admission omitted or qualified, as the truth required; in such case the first answer was withdrawn from the files and taken out of court and ceased to be a part of the record in the cause, and was, for all purposes of the suit, deemed to be absolutely destroyed, so that it could not be used to contradict or qualify or explain the statements of the defendant in his new answer. The inequitable advantage which the defendant gained over the plaintiff by such a practice, and the incentive to perjury which resulted from permitting a defendant to withdraw from the files his sworn answer and substituting a new one in its stead, led Lord Thurlow to adopt a new and better rule by which the first answer remained unaltered on file as a part of the record in the cause, and the defendant was, for the purpose of correcting the mistake, permitted to file a supplemental or additional answer, thereby leaving to the parties the effect of what had been sworn to by the defendant in his original answer with the correction and explanation given in his supplemental answer; and this rule became the settled course of procedure in courts of equity in England and the United States, and it has been followed in all cases where the object has been (1) to correct a mistake in an answer as to the statement of any matter of fact, or (2) to suppress or qualify the incorrect admission of a fact stated by the plaintiff in his bill, or (3) to allege any new facts which existed at the time the answer was filed, but which were not then known to the defendant, or (4) to allege any new matters of fact which had occurred or arisen after the answer was filed. The new practice requires that, when a supplemental answer is filed, the old answer must remain on file as it was originally put in; and the old answer and the new one are deemed one record, and the two taken together constitute the

answer of the defendant in the cause. The rule is based upon considerations of public policy, and to prevent injustice to the plaintiff by allowing the defendant to suppress his sworn admissions of the allegations of the bill which constitute the basis of the claim to relief; the court, by having before it all of the sworn statements of the defendant in answering the bill, is the better enabled to determine the weight and value of the answer as evidence, and do full and complete justice to the parties; and carelessness and indifference in making answers, and the motive to fabricate false defenses, are diminished.¹ Chancellor Walworth stated the practice as follows: "The practice of amending the answer of a defendant which prevailed previous to the time of Lord Thurlow has been discontinued in this country as well as in England. The modern practice is upon a proper showing to the court to permit the defendant to file a supplemental answer, thus giving the plaintiff the benefit of the original answer, with the explanations or denials contained in the supplemental answer. Under such an answer, if the defendant by mistake or misapprehension of the facts of his case, or of his rights, has made an admission in his original answer which is inconsistent with the truth, he will have an opportunity by proofs to show the fact was otherwise, and thus relieve himself from the consequences of his mistake."² The power of the court to allow amendments in furtherance of justice at any time before a final decree is unquestionable. They are always in the discretion of the court; but the exercise of that discretion must be governed by those general principles

¹Dolder v. Bank of England, 10 Ves. 284; Wells v. Wood, 10 Ves. 401; Jennings v. Merton College, 8 Ves. 79; Curling v. Marquis Townshend, 19 Ves. 628; Levesey v. Wilson, 1 Ves. & Bea. 149; Strange v. Collins, 2 Ves. & Bea. 163; Edwards v. McLeary, 2 Ves. & Bea. 256; Jackson v. Parish, 1 Sim. 505; Greenwood v. Atkinson, 4 Sim. 54; Taylor v. Obee, 3 Price, 83; Ridley v. Obee, Wightw. 32; Muddock's Case, 2 Bland, 261; Tedswell v. Bowyer, 7 Sim. 64; White v. Sayer, 5 Sim. 266; Chute v. Dacre, 1 Ch. Cas. 29; Mullins v. Simmonds, Bunb. 186;

Ely v. James, Bunb. 295; Gainsborough v. Gifford, 2 P. Wms. 424; Foster v. Foster, 2 Bro. 619; Patterson v. Slaughter, Dick. 285; Wharton v. Wharton, 2 Atk. 294; Bower v. Cross, 4 Johns. Ch. 375; Dagley v. Crump, Dick. 35; Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008; 1 Smith's Ch. Pr. 269, 270; 2 Daniell, 337, 343; Hughes v. Bloomer, 9 Paige Ch. 269; Swallow v. Day, 2 Coll. Ch. 133; Talmage v. Pell, 9 Paige Ch. 412.

²Hughes v. Bloomer, 9 Paige Ch. 269.

of equity by which the proceedings in courts of equity are regulated.¹ In matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such an application they require very cogent circumstances, and such as repel the notion of any attempt of the party to evade the justice of the cause, or to set up new and ingeniously contrived defenses or subterfuges. Where the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased; since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room open for the introduction of testimony manufactured for the occasion. But where the new facts sought to be introduced are written papers or documents which have been omitted by accident or mistake, there the same reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them. The whole matter rests in the sound discretion of the court.²

§ 344. Same — United States equity rules.—Justice Story, in an elaborate opinion in a case³ in the circuit court, discussed the English cases, and fully adopted and followed the practice established by Lord Thurlow, by which supplemental answers were substituted for amendments; and the opinion of Justice Story was followed by the promulgation of an equity rule, which is as follows: "After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or reference to a document, or other small matter, and be resworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding

¹ *Fulton Bank v. Beach*, 1 Paige Ch. 429.

³ *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008.

² *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008.

new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.”¹ This equity rule, though using the word “amendment” instead of the words “supplemental answer,” embodies the principle of Lord Thurlow’s rule, leaving it, however, to the discretion of the court or judge to require a separate engrossment.

§ 345. Requisites of application to amend an answer, or file a supplemental answer.—Under the English practice, if the defendant desired to obtain leave to file a supplemental answer to correct or alter the statements of his original answer, he was required to state in his application specifically what he wished to put upon the record by the new answer;² and it was required that the affidavit in support of the application should state “that the defendant, when he put in his answer, did not know the circumstances upon which he now applies, or any other circumstances upon which he ought to have stated the fact otherwise.”³ It was also necessary that the opposite party should have notice of the application.⁴ The application is addressed to the discretion of the court; and a defendant making the application must make out such a case that it shall appear due to general justice to permit the issue to be altered.⁵

§ 346. When answer may be amended, or supplemental answer filed.—If upon the hearing of a cause it appears that the defendant has not put in issue facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, the defendant will be permitted to state those facts, by amending his answer or by filing a supplemental answer, and this may be done after

¹ Equity Rule 60.

wards v. McLeary, 2 Ves. & Bea.

² Curling v. Marquis Townshend, 256.

19 Ves. 628.

⁴ 1 Smith’s Ch. Pr. 270.³ Wells v. Wood, 10 Ves. 401; Ed-⁵ Wells v. Wood, 10 Ves. 401.

the court has heard the cause and before decree.¹ A federal statute provides that "no summons, writ, declaration, return, process, judgment, or other proceeding in any civil cause in any of the courts of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but the said courts respectively shall proceed and give judgment according as the right of the cause and matters in law shall appear to it, without regard to any such defects or want of form in such writ or declaration, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and the said courts shall amend every such defect and want of form, other than those which the party demurring expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion, and by its rules, prescribe."² The power of the court to permit at any time either of the parties to a suit in equity to amend their pleadings is expressly conferred by this statute.³

§ 347. Supplemental answer to amended bill.—An equity rule provides that, in every case where an amendment to a bill "shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in case of an omission to put in an answer."⁴ And when the plaintiff amends his bill after answer filed, it is irregular and improper to file a replication to the first answer before the time for answering the amendment has expired.⁵

§ 348. A further answer upon sustaining exceptions for insufficiency.—An equity rule provides that: "If at the hearing" (of exceptions for insufficiency) "the exceptions shall be

¹ Redesdale (6th Am. ed.), 390; Cooper's Eq. Pl. 339; Arnett v. Welch, 46 N. J. Eq. 543; United Railroad & Canal Co. v. Long Dock Co., 41 N. J. Eq. 407; Sawyer v. Campbell, 130 Ill. 186.

² 1 U. S. Stat. at L., ch. 20, sec. 32, p. 91; U. S. R. S., sec. 945.

³ Hunt v. Rousmaniere, 2 Mason,

342, Fed. Cas. No. 6,898; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. R. 599, 600; Neal v. Neal, 76 U. S. 1, 12; Hardin v. Boyd, 113 U. S. 761.

⁴ Equity Rule 46.

⁵ Richardson v. Richardson, 5 Paige Ch. 58.

allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.”¹

§ 349. Taking answers off the file.—If an answer is formally defective, it may, upon the motion of the plaintiff, be taken off the file. If an answer fails to state that it is an answer to the bill of complaint, or if it fails to state correctly the names of the plaintiffs, or if the answer is not signed and sworn to by all the defendants whose answer it is, it will, upon motion, be taken off the file.² A joint and several answer of three persons, sworn to by two only, may be taken off the file.³ An answer cannot be taken off the file because the defendant is in contempt in refusing to obey an order of the court.⁴

¹ Equity Rule 64.

Young, 12 Blatchf. 199, Fed. Cas. No. 75.

² 1 Smith's Ch. Pr. 267, 268.

³ Bailey Washing Machine Co. v. ⁴ Hovey v. Elliott, 167 U. S. 409, 447.

CHAPTER XV.

PROCEEDINGS TO BE TAKEN BY PLAINTIFF UPON AN ANSWER FILED.

§ 350. Proceedings by plaintiff upon answer of defendant filed.

351. Same—Due order of proceeding

§ 350. Proceedings by plaintiff upon answer of defendant filed.—When the defendant's answer is filed, the plaintiff's counsel has until the next succeeding rule-day to examine and consider it, and to determine what course should be pursued in relation to it; and he may take either one of four steps in regard to the answer, according as it may require, namely: 1. He may file exceptions to the answer either (1) for insufficiency, or (2) for scandal and impertinence, or (3) for both causes at the same time.¹ 2. He may amend his bill for the purpose of putting in issue new matter set up in the answer, or for more fully developing the circumstances of such new matter.² 3. He may set the cause down for hearing on bill and answer.³ 4. He may file the general replication to the answer and thereby put the cause at issue.⁴

§ 351. Same—Due order of proceeding.—In proceeding upon a defendant's answer, there is an order in point of time in taking the various steps which must be observed by plaintiff, or he will waive some of his rights. The first step in the series of proceedings by the plaintiff upon defendant's answer is to file exceptions for insufficiency and for scandal and impertinence. Both classes of exceptions may be filed at the same time; but the right to except may be waived by the following proceedings: (1) By obtaining an order to amend the bill, unless the order is expressed to be without prejudice to the right to except;⁵ (2) by setting the cause down for final

¹ Equity Rules 27, 61.

² Equity Rule 45; *ante*, § 149.

³ Equity Rules 41, 60; *Reynolds v. Crawfordsville Bank*, 112 U. S. 409;

Banks v. Manchester, 128 U. S. 244, 254.

⁴ Equity Rule 66.

⁵ *Dixon v. Redmond*, 2 Sch. & Lef.

hearing on bill and answer, for by so setting the cause down for hearing the plaintiff asserts that the admissions of the answer are sufficient to entitle him to a decree, without proof or further answer;¹ (3) by filing the general replication to the answer;² (4) by failing to file such exceptions on the rule-day next succeeding that upon which the answer is filed.³ If the plaintiff sets the cause down for hearing on bill and answer, he waives his right to deny and disprove the answer.⁴

515; *De la Torre v. Bernales*, 4 Mod. 396; *Jacob v. Hall*, 12 Ves. 458.

¹See *ante*, § 327, and authorities there cited.

²1 Smith's Ch. Pr. 279, 280; 2 Daniell, 308.

³Equity Rule 61.

⁴*Pierce v. Brown*, 7 Wall. 205; *Mills v. Pittman*, 1 Paige Ch. 489.

CHAPTER XVI.

EXCEPTIONS TO ANSWERS.

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| <p>§ 352. Two classes of exceptions to answers.</p> <p>(a) EXCEPTIONS FOR INSUFFICIENCY.</p> <p>353. Definition of exceptions for insufficiency.</p> <p>354. When exceptions for insufficiency will be sustained.</p> <p>355. Exceptions to answers not under oath.</p> <p>356. Form and requisites of exceptions for insufficiency.</p> <p>357. When exceptions for insufficiency must be filed.</p> | <p>§ 358. Procedure on exceptions for insufficiency.</p> <p>359. Same—Further answer when exceptions allowed.</p> <p>360. Same—Costs upon exceptions.</p> <p>(b) EXCEPTIONS FOR SCANDAL AND IMPERTINENCE.</p> <p>361. Definition of scandal and impertinence.</p> <p>362. Each exception must be supported <i>in toto</i>.</p> <p>363. Filing the exceptions and procedure thereon.</p> |
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§ 352. Two classes of exceptions to answers.—There are two classes of exceptions to answers in equity, viz.: (1) Exceptions for insufficiency; and (2) exceptions for scandal and impertinence. The functions and office of the two classes of exceptions are widely different; the office of the first class being to compel full discovery; and the office of the second class being to expunge from the answer all purely irrelevant and scandalous matter. Under the English practice, the plaintiff could not file contemporaneously exceptions for insufficiency and impertinence; but, if he desired to except for both impertinence and insufficiency, he must first file exceptions for impertinence, and have them referred to a master, and secure his report thereon, and then file his exceptions for insufficiency; and if he filed exceptions for insufficiency before securing the master's report on the exceptions for impertinence, the latter were thereby waived. But a reference for scandal could be made at any time.¹ The English practice has, however, been materially changed by the United States equity rules.²

¹ 2 Daniell, 297.

² Equity Rules 26, 27, 61, 63, 64, 65.

(a) EXCEPTIONS FOR INSUFFICIENCY.

§ 353. Definition of exceptions for insufficiency.—Exceptions to an answer in equity for insufficiency are written allegations filed in the cause by the plaintiff, in which he alleges that the defendant has not fully answered all the material allegations, charges and interrogatories of the bill; and stating such parts of the bill as the plaintiff conceives are not fully answered, and pointing out specifically in what respects the answer is insufficient, and wherein it fails to give the material discovery required by the bill, and praying that the defendant may in such respects be compelled to put in a full answer to the bill. The object of such exceptions is not to question the legal sufficiency of the answer as a defense in bar of the relief sought by the bill, but to deny that the defendant has given all the material discovery required by the bill, and to compel a further and full discovery and admission of facts to be used as evidence in establishing plaintiff's right to a decree.¹

§ 354. When exceptions for insufficiency will be sustained. All the writers upon the subject of equity pleading, and all the adjudicated cases upon the subject, lay down the principle distinctly, that exceptions to an answer for insufficiency cannot be sustained, unless there is some material allegation, charge or interrogatory in the plaintiff's bill which has not been fully answered by the defendant; and where new matter, not responsive to the bill, is stated in the answer, if such new matter is wholly irrelevant and forms no sufficient defense to the case for relief made by the bill, the plaintiff may except to the answer for impertinence; but such matter cannot be made the subject of exceptions for insufficiency.²

§ 355. Exceptions to answers not under oath.—When a corporation is sued in equity, the law, on account of the very necessities of the case, dispenses with an answer under oath, and requires the defendant corporation to answer under its common seal; and United States equity rule 41 authorizes

¹ Redesdale (6th Am. ed.), 373; Cooper's Eq. Pl. 319; Stafford v. Brown, 4 Paige Ch. 88. Buloid v. Miller, 4 Paige, 473; Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947; Redesdale (6th Am. ed.), 376;

² Stafford v. Brown, 4 Paige Ch. 88; Cooper's Eq. Pl. 319.

the plaintiff to waive an answer under oath from an individual defendant, and provides that if the defendant answers under oath, such answer shall not be evidence in his favor; but in both classes of cases the plaintiff is entitled to a full answer from the defendant; and if the defendant omits to answer any material allegation, charge or interrogatory contained in the bill, the plaintiff may except to such answer for insufficiency, and compel a full and perfect answer, as in other cases. The fact that a corporation, being an ideal person, must answer under its common seal, or the waiver by plaintiff of an answer under oath, does not deprive the plaintiff of his right to a full answer and a full discovery from the defendant upon every material point in the bill. The defendant is bound by the admissions in his answer, though put in without oath, and the plaintiff may avail himself of any admissions in such answer that tend to establish his case. The plaintiff's object in waiving an answer under oath, and the only effect of such waiver, is to deprive the defendant of the advantage of his answer as evidence for himself.¹

§ 356. Form and requisites of exceptions for insufficiency. Exceptions to an answer for insufficiency should be entitled in the cause and should state in a concise and specific manner the points which defendant has failed to answer; and they should state, in the very terms thereof, the allegations and charges of the bill, and the interrogatories, if any, based thereon, which it is alleged are not fully answered, and should in like manner state in full, and in the very terms thereof, that part of the answer which is addressed to such allegations, charges and interrogatories of the bill, so that the court, without searching the bill and answer, will be able to see the grounds of the exceptions, and ascertain if they are well founded, and decide upon them and make the proper order.² The exceptions should con-

¹ *Kittridge v. Claremount Bank*, 1 Woodb. & M. 244, Fed. Cas. No. 7,859; *Whittmore v. Patton*, 81 Fed. R. 527; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. R. 26; *Uhlmann v. Arnholt & Schaeffer Brewing Co.*, 41 Fed. R. 369; *Gamewell Fire Alarm Tel. Co. v. Mayor*, 31 Fed. R. 312; *Colgate v. Compagnie*, 23 Fed. R. 82; *Reed v. Cumberland Mut. Ins. Co.*, 36 N. J. Eq. 393; *Manley v. Mickle*, 55 N. J. Eq. 567; *ante*, § 118, where this subject is fully discussed.

² *Brooks v. Byam*, 1 Story, 296, Fed. Cas. No. 1,947.

clude with a prayer that the defendant be compelled to put in a full and sufficient answer,¹ and should be signed by counsel² and filed with the clerk³ and entered on the order book.⁴

§ 357. When exceptions for insufficiency must be filed.—

An equity rule provides that: "After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient."⁵ Where the defendant pleads or demurs to any part of the discovery sought by the bill, and answers also, if the plaintiff files exceptions to the answer for insufficiency before the plea or demurrer has been argued, he thereby admits the plea or demurrer to be good; but if the plea or demurrer is only to the relief prayed for by the bill, or to some part of it, and not to any part of the discovery, the plaintiff may file exceptions for insufficiency to the answer before the plea or demurrer is argued, without admitting it to be good.⁶ When upon argument of a plea it is ordered to stand for an answer, the plaintiff should have inserted in the order the words, "with liberty to the plaintiff to except," or the order may have the effect to establish the plea as a sufficient answer to so much of the bill as it covers.⁷

§ 358. Procedure on exceptions for insufficiency.— Under the former English practice, exceptions for insufficiency were referred to a master;⁸ but, under the United States equity rules, exceptions for insufficiency are set down for a hearing before a judge of the court in the first instance, and are never referred to a master.⁹ An equity rule provides: "Where exceptions

¹ Curtiss, Eq. Precedents.

² 1 Smith's Ch. Pr. 81.

³ Equity Rule 61.

⁴ Equity Rule 4.

⁵ Equity Rule 61.

⁶ *Ante*, § 303; Redesdale (6th Am. ed.), 378; Siffkin v. Manning, 9 Paige Ch. 222; Boyd v. Mills, 13 Ves. 85; London Assurance Co. v. East India Co., 3 P. Wms. 325, 327; Darnell v.

Reyner, 1 Vern. 344; Sidney v. Perry, 2 Dick. 602.

⁷ Orcutt v. Orms, 3 Paige Ch. 459; Maitland v. Wilson, 3 Atk. 815; Sellon v. Lewen, 3 P. Wms. 239; Coke v. Wilcocks, Mosel. 73; *ante*, § 297.

⁸ 2 Daniell, 295-301.

⁹ Equity Rule 63; La Vega v. Lapsley, 1 Woods, 428, Fed. Cas. No. 8,123.

shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.”¹ Under this rule the plaintiff is allowed from one rule-day to another to file his exceptions to an answer; and the exceptions being filed, the defendant is allowed to the next succeeding rule-day to submit to the exceptions, and file an amended answer, and if he fails to do so within that time the plaintiff must on the next succeeding rule-day set down the exceptions for a hearing before a judge of the court on the next rule-day following. The plaintiff is only allowed to set down the exceptions for a hearing on a rule-day, to be heard before a judge at the next succeeding rule-day. The exceptions cannot be referred to a master.²

§ 359. Same — Further answer when exceptions allowed.

“If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.”³

¹ Equity Rule 63.

² Equity Rule 64.

³ *La Vega v. Lapsley*, 1 Woods, 428, Fed. Cas. No. 8,121.

§ 360. Same—Costs upon exceptions.—“If, upon argument, the plaintiff’s exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.”¹

(b) EXCEPTIONS FOR SCANDAL AND IMPERTINENCE.

§ 361. Definition of scandal and impertinence.—Scandal is anything alleged in a bill, answer or other pleading which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause, or which bears cruelly upon the moral character of an individual; but nothing relevant will be deemed scandalous.² Impertinence is where the pleadings are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question.³ Facts not material to the decision are impertinent, and if reproachful are scandalous.⁴ The test of impertinence is this: If the matter of the answer is relevant, that is, if it can have any influence whatever in the decision of the suit either as to the subject-matter of the controversy, the particular relief granted, or as to the costs, it is not impertinent.⁵

§ 362. Each exception must be supported in toto.—Each exception for impertinence must be supported *in toto*, or it must fail altogether; if any part of the matter alleged to be impertinent is not so, the whole exception fails, though some part of the matter complained of is impertinent. If an exception for impertinence embraces matters of the answer which are responsive to allegations in the plaintiff’s bill as well as matters which are impertinent, the whole exception must be disallowed; and when an exception for impertinence embraces matters which are proper and material to the defendant’s de-

¹ Equity Rule 65.

⁴ Wood v. Morrell, 1 Johns. Ch. 103.

² 1 Smith’s Ch. Pr. 567; Redesdale (6th Am. ed.), 371, 373; 1 Daniell, 452.

⁵ Van Rensselle v. Brice, 4 Paige Ch. 174.

³ 1 Smith’s Ch. Pr. 567; 1 Daniell, 454.

fense, the exception will be overruled. An exception for impertinence cannot be allowed in part only.¹ The court will not expunge matter alleged to be impertinent, unless it clearly appears that it is so, for the reason that if improperly done the error would be irremediable as to the party affected by it, but not so as to the opposite party, who can always take advantage of impertinence at the hearing.²

§ 363. Filing the exceptions and procedure thereon.—Exceptions for scandal or impertinence must be taken in writing, describing the particular passages of the answer which are considered to be scandalous or impertinent; they must be filed on or before the next rule-day after the answer is filed, and referred to a master, who should examine and report upon them on or before the next succeeding rule-day.³ The master reports by certificate, stating that the matter is or is not scandalous or impertinent; and either party may bring the matter on for argument before the court, by filing exceptions in the clerk's office to the report of the master,⁴ which exceptions to the report should be filed within one month from the time of filing the report.⁵ When the master certifies that the answer is scandalous or impertinent, and no exceptions are filed to his report within the time allowed by the rules, the master then, without any further order upon the subject, upon notice to the counsel or solicitors of the parties, expunges from the answer the objectionable matter, by drawing a pen line through it, and writing his initials opposite, and then certifies to the court his action, and returns the answer to the files.⁶

¹ *Tench v. Cheese*, 1 Beav. 571;
Curtis v. Masters, 11 Paige Ch. 15;
Balcom v. Life Ins. Co., 11 Paige Ch.
454.

² *Davis v. Cripp*, 2 Y. & Coll. Ch.
443.

³ Equity Rule 27.

⁴ 2 *Daniell*, 317, 328; 1 *Daniell*, 457,
458; 1 *Smith's Ch. Pr.* 572, 573.

⁵ Equity Rule 83.

⁶ 1 *Daniell*, 458, 459; 1 *Smith's Ch.*
Pr. 572.

CHAPTER XVII.

REPLICATIONS.

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| <p>§ 364. Lord Redesdale's definition and history of the replication.</p> <p>365. Special replications prohibited by United States equity rule.</p> <p>366. The form of a general replication.</p> <p>367. The office of the general replication.</p> | <p>§ 368. Same—When replication to answer must be filed.</p> <p>369. When replication to plea must be filed.</p> <p>370. Filing replication <i>nunc pro tunc</i>.</p> <p>371. Replications when there are several answers.</p> |
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§ 364. Lord Redesdale's definition and history of the replication.—“ A replication is the plaintiff's answer or reply to the defendant's plea or answer. Formerly, if the defendant by his plea or answer offered new matter, the plaintiff replied specially; otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication. If the parties were not then at issue by reason of some new matter disclosed in the rejoinder which required an answer, the plaintiff might surrejoin to the rejoinder, and the defendant might in like manner ad-surrejoin, or rebut, to the rejoinder. The inconvenience, delay and unnecessary length of pleading arising from these various allegations on each side caused an alteration in the practice. Special replications, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matters may have been introduced by the defendant's plea or answer. But if the plaintiff conceives, from any matter offered by defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend the bill, and suit it to

his case, as he shall be advised. To this amended bill the defendant may make such defense as he shall think proper, whether required by the plaintiff to answer it or not. According to the present course of the court, although rejoinders are disused, yet the plaintiff, after replication, must serve upon the defendant a subpoena requiring him to rejoin, unless he will appear gratis. The effect of this process is merely to put the cause completely at issue between the parties. For now, immediately after the defendant has appeared to rejoin gratis, or after the return of a subpoena to rejoin served on the defendant, and which by order obtained of course is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings on each side. Where by mistake a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc*.”¹

§ 365. Special replications prohibited by United States equity rule.— A United States equity rule, promulgated March 2, 1842, is as follows: “No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct.”² This rule is merely declaratory of the rule of practice which already existed and had for a long time prior to the promulgation of the rule, and applies to pleas as well as to answers.³ Lord Redesdale stated the rule as follows: “Special replications, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matter may have been introduced by the defendant's plea or answer. But if the plaintiff conceives from any matter offered by the defendant's plea or answer that his bill is not properly adapted to his case, he may obtain leave to

¹ Redesdale (6th Am. ed.), 382, 383, 384.

² Equity Rule 45.

³ Redesdale (6th Am. ed.), 382, 383; Rhode Island v. Massachusetts, 14 Pet. 210; Mason v. Hartford, Provi-

dence & Fishkill R. Co., 10 Fed. R. 334; Green v. Bogue, 158 U. S. 478, 500; Pearce v. Rice, 142 U. S. 28; Horn v. Detroit Dry Dock Co., 150 U. S. 625.

amend the bill and suit it to his case, as he shall be advised.”¹ And the various provisions of the equity rules in regard to the allowance of amendment of bills after pleas filed, and replying to and taking issue upon pleas, leave no doubt as to the intention of the supreme court to prohibit special replications to pleas.²

§ 366. The form of a general replication.—The form of a general replication is: The replication of A. B., the plaintiff, to the answer (or plea) of C. D., the defendant. This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said answer (or plea), for replication thereunto saith that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer (or plea) of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer (or plea) contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

§ 367. The office of the general replication.—The office of the general replication is to close the pleadings, put the cause completely at issue between the parties, and put it in readiness for the proofs.³ The general replication denies every allegation in the answer which is not responsive to the bill, but it does not deprive the plaintiff of the benefit of the admissions in the answer of any of the allegations and charges of the bill;⁴ for, when the plaintiff takes issue upon the answer, what is confessed and admitted by it need not be proved, but if the defendant admits the facts stated in the bill and insists upon other facts in avoidance, he must prove the facts so in-

¹ Redesdale (6th Am. ed.), 332, 333.

² Equity Rules 29, 30, 33, 35, 38.

³ Redesdale (6th Am. ed.), 383, 384;

Pierce v. Brown, 7 Wall. 205; Mills v. Pittman, 1 Paige, 490, 491; Wash-

ington, Alexandria & Georgetown R. Co. v. Bradley, 10 Wall. 299; Equity Rule 66.

⁴ Humes v. Scruggs, 94 U. S. 22; Cavender v. Cavender, 8 Fed. R. 641.

sisted on in defense.¹ If the plaintiff wishes to prove any fact alleged in the bill and not admitted by the answer, or if he wishes to disprove any allegations in the answer, he must file the general replication, and if he does not he will not be entitled to produce any evidence in the cause, and the answer will be taken as true.²

§ 368. Same — When replication to answer must be filed.

The office of the replication, the time when it shall be filed, and the consequences of omitting or refusing to file it, are defined and declared by the United States equity rules, one of which is as follows: "Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed."³ Under the rules, where no exceptions for insufficiency are filed to the answer, the plaintiff has sixty days from the filing of answer in which to file the general replication. It is provided by one of the rules that when an answer is filed on a rule-day the plaintiff shall have until the next succeeding rule-day to determine whether or not he will file exceptions; and if none be filed within that period, the answer shall on and from that day be deemed and taken as sufficient; and another rule provides that if no exceptions be filed, the plaintiff shall file the general replication on or before the rule-day next succeeding that upon which the answer was taken and deemed sufficient.⁴

¹Hart v. Ten Eyck, 2 Johns. Ch. 62; Roach v. Summers, 20 Wall. 165; Bank v. Manchester, 128 U. S. 244; Clements v. Moore, 6 Wall. 299; Seitz v. Mitchell, 94 U. S. 580.

²Pierce v. Brown, 7 Wall. 205; Mills v. Pittman, 1 Paige Ch. 490, 491.

³Equity Rule 66.

⁴Equity Rules 61, 66; Hendricks v. Bradley, 85 Fed. R. 508.

§ 369. When replication to plea must be filed.—When a plea is filed, if the plaintiff does not set it down for argument, he should file thereto the general replication on the next succeeding rule-day after the plea is filed. This is controlled by an equity rule which provides that: “If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.”¹

§ 370. Filing replication *nunc pro tunc*.—The court has power at all times and in all cases to allow a replication to be filed *nunc pro tunc*, and the power will be reasonably exercised where reasonable excuse or sufficient cause is shown for the delay; as where, by mistake, a replication has not been filed, and yet both parties have proceeded to examine witnesses, as if the general replication had been filed.² And where an equity cause has been heard upon its merits, upon bill, answer and proofs taken, as upon issue joined, the want of a formal replication cannot be assigned as error on appeal.³

§ 371. Replications when there are several answers.—The answer of every defendant, when sufficient, must be replied to without reference to the state of the cause or of the pleadings in regard to any of the other defendants. Any defendant whose answer is sufficient has the right to have the cause as to himself put at issue, so that he may proceed to take testimony if he so desires. But where the cause is not at issue as to all the defendants, and where it is not proper to compel the plaintiff to go to the proofs until the cause is at issue as to all the defendants, the court will, upon a proper application, make an order enlarging the time, under equity rule 69, for the plaintiff to take proofs in the cause upon the issues formed upon the answers of the defendants as to whom the cause is at issue.⁴

¹ Equity Rule 38.

³ Cent. Nat. Bank of Baltimore v.

² Equity Rule 66; Fischer v. Wilson, Conn. Mut. Life Ins. Co., 104 U. S. 16 Blatchf. 220, Fed. Cas. No. 4,812; 54, 77; Clements v. Moore, 6 Wall. 310. Robinson v. Randolph, Fed. Cas. No. 11,963; Jones v. Brittan, 1 Woods, Fed. Cas. No. 2,986. 667, Fed. Cas. No. 7,455.

⁴ Coleman v. Martin, 6 Blatchf. 291,

CHAPTER XVIII.

CROSS-BILLS.

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| <p>§ 372. Origin of cross-bills.</p> <p>373. Lord Redesdale's definition of a cross-bill.</p> <p>374. Cross-bill defined by the United States supreme court.</p> <p>375. The essential characteristics of a cross-bill.</p> <p>376. The cross-bill must be germane to the original bill.</p> <p>377. Cross-bill for relief.</p> <p>378. Relief on answer without cross-bill.</p> <p>379. Cross-bill for discovery.</p> <p>380. Frame of cross-bill — Parties to cross-bill — Filing cross-bill.</p> | <p>§ 381. A cross-bill is an ancillary suit.</p> <p>382. Service of subpoena on cross-bill.</p> <p>383. Priority of right to an answer to the original and cross-bills.</p> <p>384. Same — Enlarging publication till cross-bill is answered.</p> <p>385. Original and cross-bills heard together.</p> <p>386. Effect on cross-bill of dismissing original bill.</p> <p>387. No appeal from decree dismissing cross-bill.</p> |
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§ 372. **Origin of cross-bills.**—Cross-bills, like many other features of equity pleading and procedure, were derived from the civil law. The following statement of their origin and nature is found in the Forum Romanum: “When the *reus* was brought in to answer, he was said to be convened, which they call *conventio*, because the plaintiff and defendant met to contest; and since the defendant might likewise have demands against the plaintiff, he had liberty to exhibit a libel against him also, which they called *reconventio*. If the *reconventio* came in before the *litis contestatio*, then both causes went *pari passu*, and the same probatory term was assigned to both, and the same time given to publication; but the defendant was to answer in the *conventio* before the plaintiff was to answer on the *reconventio*, because the plaintiff first brought the defendant into court to answer his suit, and the defendant's *reconventio* was only a superstructure upon it. But if the *reconventio* comes in after the *litis contestatio*, there both causes do not go *pari passu*, and therefore it does not stop the plaintiff in the examination of his witnesses; but if the plaintiff be in

contempt for not answering on the *reconventio*, there he is estopped from proceeding on his own *conventio*, for he cannot proceed in that court when he has gone out of it, and must be attached to answer. But if the *reconventio* comes in after publication it will stop the hearing till the plaintiff has contested it; because otherwise, if the defendant has a right, he cannot have a decree upon the plaintiff's libel. Our law touching cross-bills, which is the *reconventio* with us, agrees in all things with this; for if the cross-bill comes in before issue joined, it goes *pari passu* with the original bill; but if it comes in after issue joined, it cannot go *pari passu* with it, and stops nothing till the plaintiff has incurred a contempt; but if it comes in after publication it stops the hearing till answered, and the rather with us, because the defendant has a right to the plaintiff's answer upon oath; but if such bill be filed after publication, nothing can be put in the issue upon it that was in issue upon the original cause."¹

§ 373. Lord Redesdale's definition of a cross-bill.—“A cross-bill is brought by a defendant against a plaintiff or other parties in a former bill pending, touching the matter in question in that bill. A bill of this kind is usually brought to obtain either a necessary discovery or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills to bring every matter in dispute completely before the court, litigated by the proper parties and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court. A cross-bill should state the original bill and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross-litigation or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But as a cross-bill is generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at

¹ For. Rom. (Tyler's ed.) 45, 46, 47.

least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. A cross-bill may be filed to answer the purpose of a plea *puis darrein continuance* at the common law. . . . Upon hearing a cause it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly before the court for decision; and will reserve the directions or declarations which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until the new bill is brought to a hearing.”¹

§ 374. Cross-bill defined by the United States supreme court.—“A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of the facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is an auxiliary to the proceeding in the original suit and a dependency upon it.”² “New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection

¹ Redesdale (6th Am. ed.), 97-100. v. Barrow, 17 How. 130; *Ex parte*

² Ayers v. Carver, 17 How. 591; Railroad Co., 95 U. S. 221.
Cross v. De Valle, 1 Wall. 5; Shields

of non-joinder, and the complainant is forced to amend, or his bill will be dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary.”¹

§ 375. The essential characteristics of a cross-bill.—According to the authorities² cited in the three sections next preceding, and which are in line with the universal current of authority, the essential characteristics of a cross-bill are: 1. It is filed by a person who is a defendant to an original bill in equity already pending. 2. It is filed in the same court where the original bill is pending. 3. It is filed against (1) the plaintiff in the original bill, or (2) other defendants in the original bill, or (3) both the plaintiff and other defendants in the original bill. 4. The subject-matter of the cross-bill is the same as the subject-matter of the original bill. 5. It is filed for the purpose of obtaining either (1) a discovery of the facts in aid of the defense to the original bill, or (2) to obtain full and complete relief to all parties as to the matters charged in the original bill. 6. It cannot introduce new and distinct matters not embraced in the original bill. 7. The cross-bill is auxiliary and ancillary to the proceeding in the original suit, and a dependency upon it. 8. New parties cannot be introduced into a cause by a cross-bill.³

§ 376. The cross-bill must be germane to the original bill.—It is said in some of the adjudicated cases that the cross-bill must be germane to the original bill; this is only a differ-

¹Shields v. Barrow, 17 How. 130.

²For. Rom. (Tyler's ed.), 45, 46, 47; Redesdale (6th Am. ed.), 97, 100; Ayers v. Carver, 17 How. 591; Cross v. De Valle, 1 Wall. 5; Shields v. Barrow, 17 How. 130; Ex parte Railroad Co., 95 U. S. 221; Cooper's Eq. Pl. 85.

³Mr. Cooper says: "A cross-bill . . . *ex vi terminorum* implies a bill brought by a defendant in a suit against the plaintiff, respecting the matter in question in the bill; and it is a weapon of defense in such

case. But sometimes it is brought against the co-defendants in such depending suit, where they have opposite claims which the court cannot determine upon in the bill already filed, and the determination of such clashing interests is still necessary to complete the decree. But in such last-mentioned case the original plaintiff must be named a defendant, together with the defendants in the first cause. . . . The general object of a cross-bill is to obtain from

ent mode of stating the principle that the cross-bill should not introduce new and distinct matters not embraced in the original bill, but that it must be restricted to the matters in question in the original bill. The rule does not mean that the cross-bill should state no facts not stated in the original bill, nor does it mean that the plaintiff in the cross-bill can assert no rights in the subject-matter of the original suit not conceded to him in the original bill; for if such were the meaning of the rule, a cross-bill would be utterly useless and nugatory. All that is required is, that the cross-bill shall not go outside of the matters embraced in the original bill, and introduce new and distinct matters not involved in the original suit. But the plaintiff in the cross-bill may allege additional facts connected with the subject-matter of the original, and may assert any rights he may have in the same arising out of the facts so alleged, and pray for the appropriate relief. While it is true that the cross-bill must grow out of the matter alleged in the original bill, it is also true that the very object and purpose of the cross-bill is to bring the whole matter in dispute before the court, so that there may be a complete decree touching the subject-matter of the suit, and full and complete justice done to all the parties; and if the plaintiff in the original bill does not fully state all the facts and circumstances connected with the subject-matter in controversy, but omits facts which, if alleged, would show a right in a defendant, entitling him to relief against either the plaintiff or a co-defendant, such omitted facts, however extended and voluminous, may be stated by the defendant in a cross-bill, and the appropriate relief demanded; for it is always the purpose of a court of equity to do full and complete justice to all the parties touching the matter in dispute brought before it by the original bill, and to put an end to the litigation; and the court will, of its own motion, in a proper case, direct a cross-bill to be filed, for the purpose of developing the whole case, and showing the rights of all the parties, and to enable it to decide upon them and make a com-

the plaintiff in the first cause a discovery of facts in his knowledge, which constitute the defense of the defendant in such first cause. It is also frequently brought for some relief to which he is entitled, as to have an agreement delivered up and canceled, which is the object of the first bill to have specifically performed." Cooper's Eq. Pl. 85.

plete decree.¹ But the rule is imperative that the new facts sought to be introduced by the cross-bill must be so directly and closely connected with the cause of action set up in the original bill as to render the cross-suit a mere auxiliary of the original suit or a graft upon it. The new facts which it is proper for a defendant to introduce into a pending litigation, by means of a cross-bill, are such, and such only, as it is necessary for the court to have before it to enable it to do complete justice to all the parties before it in respect to the cause of action on which the plaintiff in the original bill rests his right to ask for relief. The defendant, by his cross-bill, should be permitted to fully develop all the facts of the transactions which constitute the cause of action stated in the original bill, and to assert his rights arising out of such transactions.²

§ 377. Cross-bill for relief.—As shown in the chapters on pleas and answers, the answer of a defendant in equity is two-fold, consisting (1) of the defendant's defense to the case for relief made by the bill against him, and (2) his examination on oath giving the discovery sought by the bill.³ These two elements constitute the whole of an answer in equity; and it is confidently believed that no case can be found which holds that, under the English practice, the answer of defendant can be used to obtain affirmative relief or discovery on his behalf. The only prayer of an answer is that, the defendant having fully answered, he be discharged with his costs. And, therefore, if a defendant conceives himself entitled to any affirmative relief against the plaintiff or his co-defendant, touching the matters in question in the original bill, and seeks to obtain such relief by the decree of the court in the pending suit, he must file a cross-bill, stating the facts upon which he bases his

¹ *Ayers v. Carver*, 17 How. 591; *M. Co. v. Brown F. M. Co.*, 46 Fed. R. Cross v. De Valle, 1 Wall. 5; *Shields* 851; *Hind v. Case*, 32 Ill. 45; *Lund v. v. Barrow*, 17 How. 130; *Ex parte Skane's Enskilda Bank*, 96 Ill. 181; Railroad Co., 95 U. S. 221; *Ayers v. Krueger v. Ferry*, 41 N. J. Eq. 432; Chicago, 101 U. S. 187; *Kingsbury v. Redesdale* (6th Am. ed.), 97-100; Buckner, 134 U. S. 650, 668; *Morgan's Fletcher v. Wilson*, 1 Smedes & M. Louisiana & Texas R. & S. Co. v. Ch. (Miss.) 370. Texas Cent. R. Co., 137 U. S. 171, 202; ² *Krueger v. Ferry*, 41 N. J. Eq. Remer v. McKay, 38 Fed. R. 164; 432; *Ayers v. Carver*, 17 How. 591. Johnson R. S. Co. v. Union Switch & ³ *Wigram on Discovery*, 11, 94, 113, S. Co., 43 Fed. R. 331; *Stonemetz P.* 114.

right to relief, followed by an appropriate prayer for the same.¹ The case made by the cross-bill must be consistent with the defense set up in the answer, or it will be demurrable.² If the facts alleged in the cross-bill are nothing more than a defense to the case made by the original, and if proved could afford the defendant no affirmative relief, and if such facts may be made available by the defendant in his answer in his response to the allegations of the original bill, and his rights can be fully protected by the court upon the hearing of the original bill, the cross-bill will be demurrable.³

§ 378. Relief on answer without cross-bill.— There are two exceptions to the rule that a defendant can have no relief in equity without a cross-bill. (1) Where a bill is filed for the specific performance of a contract, and the defendant in his answer sets up a contract materially different from the contract set up in the bill, and the contract set up in the answer is established by the proof, the court will, for the sake of saving further litigation and expense, decree a performance of the contract established by the proof, without compelling the defendant to resort to a cross-bill.⁴ (2) On a bill for a general accounting and settlement, the court will decree to the defendant anything that may be due to him on the settlement, although he may not have asked for a decree by cross-bill. In such a case the object and prayer of the bill is to settle and close the account, and, therefore, in settling and closing it, the

¹ Redesdale (6th Am. ed.), 77-100; Cooper's Eq. Pl. 85-88; Cross v. De Valle, 1 Wall. 5; Washington, etc. R. Co. v. Bradley, 10 Wall. 299; White v. Bower, 48 Fed. R. 186, 183; Ford v. Douglass, 5 How. 143; Carnochan v. Christie, 11 Wheat. 446; Chicago, etc. R. Co. v. Third Nat. Bank, 134 U. S. 276; Jacobs v. Richard, 18 Beav. 300; Beddoes v. Pugh, 26 Beav. 416; Chapin v. Walker, 6 Fed. R. 794; Pattison v. Hull, 9 Cowen, 747; Miller v. Gregory, 16 N. J. Eq. 274; Scott v. Lalor, 18 N. J. Eq. 301; Mason v. McGirr, 28 Ill. 322; Norman v. Huddleston, 64 Ill. 11; Onderdonk v. Gray, 19 N. J. Eq. 66; Duryee v. Ling-

heimer, 27 N. J. Eq. 366; French v. Griffin, 18 N. J. Eq. 279; Wickliffe v. Clay, 1 Dana, 589; Morgan v. Tipton, 3 McLean, 339; Hill v. Ryan Grocery Co., 78 Fed. R. 21.

² Jackson v. Grant, 18 N. J. Eq. 146; Graham v. Tankersley, 15 Ala. 634; Berkley v. Ryder, 2 Ves. 533, 536.

³ Morgan v. Smith, 11 Ill. 194; Wing v. Goodman, 75 Ill. 159; Newberry v. Blatchford, 106 Ill. 584; Beck v. Beck, 43 N. J. Eq. 39; Weed v. Smull, 3 Sandf. Ch. 273.

⁴ Bradford v. Union Bank, 13 How. 57; Stapylton v. Scott, 13 Ves. 425; Fife v. Clayton, 13 Ves. 546; Gwyn v. Leibridge, 14 Ves. 585.

court will decree, of course, to either party, whatever may be ascertained to be due him, within the scope of the settlement sought by the bill and made by the court.¹

§ 379. Cross-bill for discovery.—A cross-bill may be brought by a defendant to obtain from the plaintiff a discovery of facts in aid of the defense to the original bill;² and this right extends not only to facts resting in the knowledge of plaintiff, but also to the discovery, production and inspection of deeds, writings and books of account in the possession or under the power and control of the plaintiff, and which are relevant and material to the defense to the original bill. The right of a defendant to discovery from the plaintiff in aid of the defense is in all respects co-equal with the right of the plaintiff to a discovery from the defendant, and a cross-bill seeking discovery in aid of the defense is rested upon the same principle, and regulated by the same rules, as an original bill praying relief and seeking discovery in aid of it; and in order for a defendant to obtain such discovery he must file a cross-bill against the plaintiff adapted to that end.³ A cross-bill is necessary to obtain the discovery, even of a deed admitted by the plaintiff in his bill to be in his possession.⁴ The necessity of a cross-bill by the defendant to obtain discovery from the plaintiff is fully recognized by the United States supreme court, and, to some extent, regulated by an equity rule, promulgated in 1842, which provides that: "Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used."⁵

¹ *Rogers v. McMachan*, 4 J. J. Marsh. Redesdale (6th Am. ed.), 98; *Cooper's* 37; *Clark v. Tipping*, 4 Beav. 588; *Eq. Pl.* 85.

Nyburg v. Pearce, 85 Ill. 393; *Toulmin v. Reid*, 14 Beav. 499; *Johnson v. Butler*, 31 N. J. Eq. 35; *Blair v. Green*, 45 N. J. Eq. 671; *Edgerton v. Young*, 43 Ill. 464.

³ *Wigram on Discovery*, 24, 25, 26; *Wiley v. Pistor*, 7 Ves. 411; *Micklethwaite v. Moore*, 2 Mer. 292; *Brown v. Newall*, 2 Mylne & Cr. 558, 574.

⁴ 1 *Smith's Ch. Pr.* 460; *Chester Iron Co. v. Beach*, 40 N. J. Eq. 63.

⁵ *Equity Rule* 72.

² *Ayers v. Carver*, 17 How. 591;

§ 380. Frame of cross-bill — Parties to cross-bill — Filing cross-bill.— 1. *Frame of a cross-bill.* A cross-bill should state the parties to the original bill, its object and prayer and proceedings thereon; and it should also state the facts and rights of the party exhibiting it, and which are necessary to be made the subject of cross-litigation, or the ground upon which he resists the claim of the plaintiff in the original bill, if that is the object of the new bill; in all other respects a cross-bill is framed as an original bill.¹ 2. *Parties to a cross-bill.* A cross-bill must be filed by a defendant to the original bill, against the plaintiff in the same suit, or against other defendants, or against both;² but where co-defendants are made defendants to a cross-bill, the plaintiff in the original bill must also be joined as a defendant in the new bill.³ A cross-bill cannot be used to introduce new parties into the cause.⁴ A cross-bill should pray that the cross-cause and the original cause may be heard at the same time, and that one decree be made and entered in both causes, disposing of the rights of all the parties in the subject-matter of the litigation.⁵ 3. *Filing cross-bill.* The proper time to file a cross-bill is at the time of putting in the answer, and before issue by replication thereto; and if not filed until after issue, the defendant is not entitled to an order to stay proceedings on the original bill until answer is made to his cross-bill, without showing some excuse for the delay in filing the new bill.⁶ A cross-bill may be filed after the time has expired for taking proofs in the original cause, and, even after publication, if the plaintiff in the cross-bill is willing to go to a hearing on the proofs already taken.⁷ Although there should be as little delay as possible in filing a cross-bill, that is a matter entirely in the discretion of the court;⁸ and even upon the hearing, the court will direct a cross-bill or cross-bills to be filed, if the pleadings on file are insufficient to bring before the court all matters necessary to enable it to fully decide upon the rights of all the

¹ Redesdale (6th Am. ed.), 98; Cooper's Eq. Pl. 85.

² Ayers v. Carver, 17 How. 591; Redesdale (6th Am. ed.), 97; Cooper's Eq. Pl. 85.

³ Cooper's Eq. Pl. 85.

⁴ Shields v. Barrow, 17 How. 130.

⁵ Wright v. Taylor, 1 Edw. Ch. 226.

⁶ Irving v. De Kay, 10 Paige Ch. 322.

⁷ Cooper's Eq. Pl. 87, 88; White v. Buloid, 2 Paige Ch. 164; Field v. Schieffelin, 7 Johns. Ch. 250.

⁸ Morgan's Louisiana & Texas R. & S. Co. v. Texas Cent. R. Co., 137 U. S. 171, 202.

parties.¹ A cross-bill is a regular and legitimate proceeding in a court of equity, to which any party defendant may resort in a proper case, without any special leave of the court; and if it is filed contrary to the usual course and practice of the court, as that it is filed after the publication of the testimony in the original suit, and contains no submission to go to the hearing on the testimony taken, such questions may be raised and determined upon demurrer.² A practice has obtained in the circuit courts of the United States of making application to the court for leave to file a cross-bill, where the defendant has delayed till after issue joined, or after the proof is taken, or after publication, and even after decree; and the supreme court has held that the granting or refusal of such leave is a matter entirely in the discretion of the court.³

§ 381. A cross-bill is an ancillary suit.—A cross-bill in equity in a circuit court of the United States is not a suit by original process; it is an ancillary suit; the cross-bill is an auxiliary to the original suit and a dependency upon it. The statutes of the United States defining the jurisdiction of the courts, and prescribing where suit shall be brought, do not apply to an ancillary or dependent suit; such suit should be brought in the court wherein is pending the original suit to which it is ancillary and upon which it is dependent, without regard to the citizenship of the parties, or any other ground of federal jurisdiction whatever; the court has jurisdiction of the defendant to the cross-bill by virtue of the jurisdiction acquired over him in the original suit. The plaintiff in the original bill, by filing his suit, comes into court voluntarily, and submits himself and the subject-matter of the suit to the jurisdiction of the court, for the purpose of enabling the court to render a complete decree, and decide upon the rights of all the parties, and to entertain all pleadings and applications, and take all proceedings that may be necessary to that end; and the plaintiff in the original bill cannot object that the court cannot entertain the cross-bill upon the ground that he is not within the

¹ Redesdale (6th Am. ed.), 98, 99, 100.

³ *Indiana, etc. R. Co. v. Liverpool,*

² *Neal v. Foster*, 34 Fed. R. 496; *Story's Eq. Pl.*, sec. 632; *Field v. Schieffelin*, 7 Johns. Ch. 250.

etc. Ins. Co., 109 U. S. 168; *Morgan's Louisiana & Texas R. & S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 202.

jurisdiction of the court and cannot be personally served with process.¹

§ 382. Service of subpoena on cross-bill.—Inasmuch as a cross-bill is an ancillary and dependent suit, the subpoena to appear and answer such bill is not, in the courts of the United States, regarded as an original process or proceeding, and does not come within the provisions of the judiciary act requiring that a party sued must be served personally with process in the district in which the suit is brought; nor is the service of such subpoena regulated by equity rule 13, directing the manner of the service of the subpoena upon original bills. But substituted service of the subpoena may be made upon the counsel of record of the plaintiff in the original bill, and defendant in the cross-bill, or it may be served upon such plaintiff in the original bill outside of the district in which the suit is pending; in order, however, to a substituted service, there should be a previous order of the court authorizing it. The proper practice in such case, it would seem from the authorities, is this: (1) The cross-bill should state the residence of the plaintiff in the original bill, if known, and should also state the names of his counsel of record, and their residence, and should pray for service of the subpoena upon such counsel of record, or upon the plaintiff in the original bill outside of the district. (2) After the cross-bill is filed, the counsel for the plaintiff therein should present to the court an application for an order authorizing substituted service upon the counsel of record, or upon the plaintiff in the original bill outside of the district. (3) The order being made, a copy of it should be attached to the subpoena when issued,

¹ Gregory v. Pike, 29 Fed. R. 588; Lowenstein v. Glidewell, 5 Dillon, 325, Fed. Cas. No. 8,575; The Cortes Co. v. Tannhauser, 9 Fed. R. 226; Johnson Railroad Signal Co. v. Union Switch & Signal Co., 43 Fed. R. 331; Hatch v. Dorr, 4 McLean, 112, Fed. Cas. No. 6,006; Babcock v. Millard, Fed. Cas. No. 690; Dunlap v. Stetson, 4 Mason, 349, Fed. Cas. No. 4,164; Milwaukee, etc. R. Co. v. Souther, 2 Wall. 609, 645; Bank v. Leland, Fed. Cas. No. 9,452; Jones v. Anderson, 10 Wall. 327; Clark v. Matthewson, 12 Pet. 164; Freeman v. Howe, 24 How. 450; In re Sabine, Fed. Cas. No. 12,195; Root v. Woolworth, 150 U. S. 401; Thompson v. McReynolds, 29 Fed. R. 657; Lamb v. Ewing, 54 Fed. R. 272, 273; Deitzsch v. Huidekoper, 103 U. S. 494; White v. Ewing, 159 U. S. 36-40; Pacific Railroad of Mo. v. Mo. Pacific R. Co., 111 U. S. 505; Gumble v. Pitkin, 124 U. S. 131; Compton v. Jessup, 68 Fed. R. 263; Blake v. Iron & Coal Co., 76 Fed. R. 624.

and delivered to the marshal who is to serve it. (4) If the order directs the subpoena to be served outside of the district upon the plaintiff in the cross-bill, it should also direct that it be served by the marshal of the district where the service is to be made. (5) When served the subpoena should be returned as in other cases.¹

§ 383. Priority of right to an answer to the original and cross-bills.—“The first peculiarity in the proceedings of a cross-bill is that the plaintiff in the original cause is entitled to have an answer to his bill before he can be compelled to answer the cross-bill. . . . The priority of an answer allowed to the plaintiff in the original cause may be waived and transferred to the plaintiff in the cross-cause, by the plaintiff's amending his original bill in things material after the filing of the cross-bill. The proceedings in the original suit are not stayed merely by the amendment, and, to deprive the plaintiff in the original cause of his priority of an answer, the amendment must be material and such as requires an answer; but the plaintiff in the cross-bill, upon such material amendments being made, must obtain an order that the proceedings in the original bill be stayed until the plaintiff shall have fully answered the cross-bill. If such order is not obtained, the plaintiff in the original cause is warranted in issuing an attachment for want of an answer, and otherwise proceeding with his original suit. The order giving a priority of answer to the plaintiff in the cross-cause may be obtained upon a petition or a motion as of course. The reason why the plaintiff in the original cause loses his priority is that the amended bill as to the amendments is a new bill, and the cross-bill being filed prior to the amendments, and the original and amended bill being considered as one record, the priority of the answer is lost as to the whole. The general rule that the plaintiff in the original suit loses his priority of answer by materially amending the original bill is not varied, although the defendant has

¹Gregory v. Pike, 29 Fed. R. 588; 4,266; Ward v. Seabring, 4 Wash. Lowenstein v. Glidewell, 5 Dillon, 472, Fed. Cas. No. 17,160; Cortes Co. 325, Fed. Cas. No. 8,575; Johnson v. Tannhauser, 9 Fed. R. 226. And see also the authorities cited under *ante*, § 381.
v. Banert, 4 Wash. 370, Fed. Cas. No.

put in an insufficient answer, and although the order to amend is made on the terms that the defendant may answer the amendments and exceptions together. . . . Although the plaintiff in the original suit is entitled to stay the proceedings in the cross-suit until the defendant in the original suit has answered, the plaintiff in the cross-suit has not the same privilege, unless the original plaintiff, by amending his bill, loses his priority."¹

§ 384. Same — Enlarging publication till cross-bill is answered.—The general rule is that the court will not stay proceedings in the original cause till the answer to the cross-bill is filed, but it will only enlarge the publication in the original cause until the plaintiff in that cause shall have fully answered the cross-bill; "and the circumstance of the plaintiff in the original bill being in contempt for the want of an answer to the cross-bill does not entitle the plaintiff in the cross-suit to stay proceedings in the original cause, but only to enlarge publication."²

§ 385. Original and cross-bills heard together.—The original bill and cross-bill constitute but one suit, and ought to be set down for final hearing together and heard at the same time, and the rights of all the parties in respect to the matters litigated in both bills should be settled and disposed of by one final decree.³ If a cross-bill be taken as confessed, it may be used by the party filing it as evidence against the plaintiff in the original bill, on the hearing, to sustain the allegations of the answer to the original bill, and with the same effect as an answer to the cross-bill admitting the facts therein charged.⁴

§ 386. Effect on cross-bill of dismissing original bill.—Where the cross-bill is purely defensive, and sets up no additional facts and seeks no affirmative relief, the dismissal of the original bill carries with it the cross-bill; but where the cross-bill alleges additional facts not alleged in the original bill, but which are directly connected with the subject-matter of the

¹ 1 Smith's Ch. Pr. 461-463.

² 1 Smith's Ch. Pr. 464, 465, 466.

³ *Ex parte Railroad Co.*, 95 U. S. 221, 227; *Cross v. De Valle*, 1 Wall. 515; *Ayers v. Carver*, 17 How. 591;

Chicago R. Co. v. Union R. M. Co.,

109 U. S. 702; *Moore v. Huntington*,

17 Wall. 417, 422; *Whyte v. Arthur*,

17 N. J. Eq. 521, 524.

⁴ *White v. Buloid*, 2 Paige Ch. 164.

original suit, and prays affirmative relief directly connected with and arising out of the matters of the original suit and the additional facts alleged, the dismissal of the original bill does not carry with it the cross-bill, and the court may order the cause to be retained for a final hearing and decree upon the cross-bill.¹

§ 387. No appeal from decree dismissing cross-bill.—A decree sustaining a demurrer to a cross-bill and dismissing it is not a final decree in the suit, and therefore not the subject of an appeal; such a decree disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case, which brings up all the proceedings in the cause for re-examination when the party aggrieved by a determination in respect to the cross-bill may have it reviewed, as in the case of any interlocutory proceeding in the case.²

¹ *Jessup v. Illinois Cent. R. Co.*, 43 Fed. R. 495; *Dawson v. Amey*, 40 N. J. Eq. 496; *Lardner v. Ogden*, 31 Miss. 344, 345; *Deweese v. Deweese*, 55 Miss. 317; *Wilkinson v. Roper*, 74 Ala. 143; *Wickliffe v. Clay*, 1 Dana (Ky.), 585; *Ragland v. Broadnax*, 29 Gratt. 410; *Lowenstein v. Glidewell*, 5 Dill. 325, Fed. Cas. No. 8,575.

“Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the cross-bill sets up matters purely defensive to the original bill, and prays for no affirmative re-

lief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may do, additional facts not alleged in the original bill relating to the same subject-matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill.” Judge Caldwell in *Lowenstein v. Glidewell*, *supra*.

² *Ayers v. Carver*, 17 How. 591.

CHAPTER XIX.

EVIDENCE.

- § 388. Rules of evidence same at law and in equity.
389. Sources of evidence in suits in equity.
- (a) THE ENGLISH CHANCERY PROCEDURE IN THE EXAMINATION OF WITNESSES.
390. All evidence taken by depositions.
391. Two kinds of examinations in chancery.
392. Officers by whom witnesses were examined.
393. Method of proceeding before examiners.
394. Examination by commissioners.
395. Examination *de bene esse*.
396. Examination of witnesses abroad — Commission and letters rogatory.
- (b) FEDERAL EQUITY PROCEDURE IN THE EXAMINATION OF WITNESSES.
397. Mode of proof in equity prescribed by federal statutes and equity rules.
398. Three months allowed to take testimony.
399. Competency of witnesses in the United States courts.
400. Two methods of examining witnesses *de bene esse*.
401. Depositions *de bene esse* under act of congress.
402. Same — Manner of taking.
403. Same — Certificate and transmission.
404. Same — Statutes construed strictly.
- § 405. Depositions *de bene esse* by commission under equity rule.
406. Four methods of examination in chief.
407. Depositions "according to common usage."
408. Same — Act of congress of March 9, 1892.
409. Depositions taken by commission under the equity rules.
410. Oral examination of witnesses before an examiner.
411. Oral examination of witnesses in open court on the final hearing.
412. Procedure to compel attendance of witnesses before examiners and commissioners.
413. Procedure to compel production of books, writings and documents before examiners and commissioners.
414. Distance witnesses may be required to travel for examination.
415. Bill *in perpetuam rei memoriam*.
416. Depositions in District of Columbia in suits pending elsewhere.
417. Letters rogatory.
418. Same — Federal statutory regulations.
419. Examination to impeach the competency and credibility of witness.
420. Demurrer to answering interrogatories.
421. Motions to suppress depositions.
422. Re-examination of witnesses.

(c) DOCUMENTARY EVIDENCE.

- § 423. Judgments and decrees conclusive evidence, when.
424. Judgments of other states entitled to full faith and credit.
425. Foreign judgments — Their weight as evidence controlled by the rule of reciprocity.
426. Parol evidence admissible to show the precise question determined by a former judgment or decree.
427. Judgments and decrees as muniments of title to real estate.
428. Docket entries evidence of receipt of money by United States marshal.
429. Authentication of judgments.
430. Authentication of foreign judgments.
431. Authentication of legislative acts.
432. Authentication of foreign laws.
433. Authentication of records from other states kept in offices not appertaining to courts.
434. Copies of records of the general land office.
435. Copies of foreign laws and records relating to land titles in the United States.
436. Copies of department records and papers.
437. Copies of records and documents in the office of the solicitor of the treasury.
438. Copies of instruments and papers in comptroller's office.
439. Copies of organization certificates of national banks.
440. Transcripts from books of the treasury department.
441. Copies of postoffice records and of auditor's statement of accounts.
- § 442. Copies of statements of demands by the postoffice department.
443. Copies of the records of the patent office.
444. Copies of foreign letters patent.
445. Printed copies of specifications and drawings of patents.
446. Extracts from the journals of congress.
447. Copies of records in the offices of consuls and commercial agents.
- 448. Little & Brown's edition of the United States statutes and treaties to be evidence.
449. Proof of the execution of deeds and other private writings.
450. Same — Secondary evidence of execution.
451. Exceptions to the rule requiring proof of execution of private writings — Ancient instruments.
452. Same — When the deed is produced by the adverse party claiming an interest under it.
453. Same — Where defendant by his answer admits the execution.
454. Proof of the execution of wills and testaments devising real estate at common law.
455. The courts of the United States have no jurisdiction to take proof of the execution of wills and testaments.
456. Proof of the execution and contents of lost instruments.
457. Same — Lost will.
458. Same — Judicial records.
459. Same — Lost deposition.
460. Same — When the instrument is beyond the jurisdiction of the court.
461. Proof of exhibits, *viva voce*, at the hearing.

§ 462. The production of documents by defendant as evidence for plaintiff.

463. Passing publication of the testimony.

464. Examination of witnesses *ad informandum conscientiam judicis*, obsolete.

(d) JUDICIAL NOTICE.

465. Judicial notice—General rule.

466. Federal courts take judicial notice of the federal constitution and laws.

467. Same—Corporations created by federal law.

468. Same—Treaties made by the United States.

469. Same—Establishment of territorial governments.

470. Federal courts take judicial notice of state laws.

471. Same—United States supreme court on writ of error to state court.

472. Courts of the United States take judicial notice of the state constitutional conventions.

473. Federal courts take judicial notice of charters granted by a state, when.

474. Federal courts take judicial notice of the laws of an antecedent government.

475. The courts of the United States will not take judicial notice of foreign laws.

476. Judicial notice of seals of notaries public.

477. Courts of one state do not take judicial notice of the laws of another state.

478. Judicial notice of territorial extent of governmental jurisdiction.

479. Judicial notice of rules of navigation.

480. Judicial notice of the proclamations of the president of the United States.

§ 481. Judicial notice of the rules and regulations of the executive departments of the federal government.

482. Judicial notice of the persons who preside over the patent office.

483. Courts do not take notice of military orders.

484. Judicial notice of the ordinary meaning of words.

485. In taking judicial notice judges may refresh their memory and inform their conscience.

(e) PRESUMPTIONS.

486. Classification of presumptions.

487. Presumptions of fact.

488. Same—Presumption as to the delivery of letters.

489. Same—Domicile.

490. Disputable presumptions of law.

491. Same—Presumption that public officers have done their duty.

492. Same—Regularity of judicial proceedings.

493. Same—That state courts will do what federal constitution and laws require.

494. Same—Presumptions in favor of patents issued for public lands.

495. Same—Persons acting in a public office.

496. Same—Presumption of death from seven years' absence.

497. Same—Persons presumed to intend necessary consequences of act.

498. Same—Presumption of legitimacy—Testamentary recognition of child—Civil-law rule.

499. Same—Presumption of date and delivery of deeds.

500. Same—Presumption of grant from long-continued possession.

- § 501. Same—Possession by husband of wife's separate property creates no presumption of a gift.
502. *Fraus est odiosa et non præsumenda* — Meaning of the maxim — Fraud established by circumstantial evidence.
503. Presumption of the satisfaction and ademption of legacies.
504. Presumptions arising from the suppression of testimony.
505. Conclusive presumptions of law.
- (f) ADMISSIONS.
506. Classification of admissions.
507. Actual admissions upon the record.
508. Constructive admissions upon the record.
509. Admissions by stipulation.
- (g) SOME GENERAL RULES OF EVIDENCE.
510. Parol evidence inadmissible both at law and in equity to vary agreements in writing — Rule stated by United States supreme court.
- § 511. Same — Extrinsic evidence to identify property and persons.
512. Same — Patent ambiguities.
513. Admissibility of extrinsic evidence in the interpretation of deeds and wills — English rule as stated by Mr. Spence.
514. Same — When the evidence will be admitted.
515. Same — Same — Extrinsic evidence to repel presumptions of law relating to legacies.
516. Vice-chancellor Wigram's seven propositions regarding the construction of wills.
517. Extrinsic evidence admissible to correct fatal misdescription of real estate in a will.
518. The best evidence must be adduced.
519. Same — Written instruments.
520. The evidence must be confined to the matters in issue.
521. Same — Confessions and admissions.

§ 388. Rules of evidence same at law and in equity.—It is a fundamental principle that courts of equity follow the common-law rules of evidence;¹ and it would be productive of very mischievous consequences if such were not the case.² An effort has been made to engraft some exceptions upon this rule, based upon a decision of Lord Hardwicke, in which he said: "I would not have it understood as if I laid down that the rules of evidence at law and in equity differ in general; but only in particular cases where fraud is charged by a bill, or in cases of trust, this court does not confine itself within such strict rules as they do at law, but, for the sake of justice and equity, will enter into the merits of the case, in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds."³ But in a later case the same

¹ Gresley's Eq. Ev. 3, 4; Glynn v. Bank of England, 2 Ves. 40; Manning v. Lechmere, 1 Atk. 453; Stevens v. Cooper, 1 Johns. Ch. 425.

² Glynn v. Bank of England, 2 Ves. 40.

³ Man v. Ward, 2 Atk. 228 (decided in 1740).

learned judge, excluding certain evidence upon the ground that it was inadmissible in a court of common law, said: "As to the question whether there is any difference between this and a court of law, I am of the opinion there is not; and it would be of mischievous consequences to lay down a different rule of evidence in equity from what it would be in law; the rules of evidence in general are the same in both courts as to the matter of fact."¹ And in a case decided prior to both of those above cited he said: "The rules as to evidence are the same in equity as at law; and if a witness was not admitted at the trial there because materially concerned in interest, the same objection will hold against reading his deposition here."²

§ 389. Sources of evidence in suits in equity.—In suits in equity the sources from which evidence is obtained by the parties respectively to maintain the issues in the pleadings joined, are: 1. The testimony of witnesses, taken upon written interrogatories and reduced to writing and filed in the cause. 2. Documentary evidence, authenticated in the manner directed by law. 3. Facts the existence of which is recognized by law without proof, and of which the court takes judicial notice. 4. Presumptions. 5. The admissions of the parties made in their respective pleadings in the cause, or by stipulation or agreement.

(a) **THE ENGLISH CHANCERY PRACTICE IN THE EXAMINATION OF WITNESSES.**

§ 390. All evidence taken by depositions:—In suits in chancery in England, as the practice stood in 1842, at the time of the adoption of the United States equity rules, evidence was not taken *viva voce* in open court as at law, but written questions were put, either by an officer of the court, or by persons duly authorized by a special writ called a commission, and the answers of the witnesses were taken down in writing by such persons, and, after being signed by the witnesses, were certified, sealed up and filed in court, and were not opened or published until all the testimony had been taken. To this general

Glynn v. Bank of England, 2 Ves. 40 (decided in 1750).

² Manning v. Lechmere, 1 Atk. 453 (decided in 1737).

rule there were two exceptions, viz.: (1) proving deeds and other written documents *viva voce* at the hearing; and (2) the oral examination of witnesses before the master.¹

§ 391. **Two kinds of examinations in chancery.**—In the English chancery there were two kinds or classes of examinations of witnesses, viz.: 1. Examinations in chief. 2. Examinations *de bene esse*. The examination in chief was the regular examination of witnesses in the cause, after it was at issue; this examination was final and absolute, and upon the evidence thus obtained the parties relied unconditionally at the hearing of the cause. The examination *de bene esse* was a provisional or conditional examination; it was executed before the cause was at issue and in a condition in which witnesses could be regularly examined, in order to protect a party against the loss of important and material evidence. Leave was granted by the court to examine a witness *de bene esse*, when there was sufficient reason to apprehend that the testimony of a material witness would be lost on account (1) of the age of the witness, he being seventy years of age and upward, and infirm, or (2) dangerous illness, or (3) his intention to shortly leave the kingdom, or (4) that he was the only witness to an important fact. If the witness who was so examined survived and was in the kingdom at the time of the examination in the cause, his deposition *de bene esse* could not be read on the hearing, but the party was required as soon as the cause was at issue to examine the witness in the regular way, and failing to do so he lost the testimony of the witness altogether.²

§ 392. **Officers by whom witnesses were examined.**—All examinations of witnesses in suits in chancery, whether in chief or *de bene esse*, were made and executed by either (1) the regular examiners of the court, or (2) commissioners. The examiners were permanent and standing officers of the court, and no commission or other special authority issued to empower them to examine witnesses; and an examination was regarded as an examination in court. If the witnesses resided in London, or within twenty miles thereof, they were examined by one of the

¹ 1 Smith's Ch. Prac. 339.

² 1 Smith's Ch. Prac. 356-374, 506-510; 1 Daniell, 474-552.

examiners of the court; if they resided more than twenty miles from London, the parties were entitled to a commission to examine them, but if they were willing to attend before the examiner they were examined by him. The commissioners were not officers of the court, and, therefore, a commission, which was a special writ requiring an order of the court allowing it, was issued to them, authorizing them to make the examination.¹

§ 393. **Method of proceeding before examiners.**—The successive steps in the examination of witnesses in chief before examiners were substantially as follows: (1) When the cause was at issue the party, plaintiff or defendant, filed his interrogatories with the clerk. They were called original interrogatories, and the rules of practice required that they should be confined to the issues made by the pleadings, should not be leading, and should be signed by counsel. (2) A day was then fixed for the examination, of which the opposite party had notice, and a subpoena, or subpoena *duces tecum*, issued out of the chancery court and was served on the witnesses, requiring them to attend. (3) On the day of the appearance of the witnesses the examiner issued a written notice to the solicitor of the opposite party, stating the names of the witnesses and the place of their abode when in London, in order that he might file cross-interrogatories. (4) The witnesses were then sworn and examined upon the interrogatories *seriatim*, and were not permitted to read over or hear read any other interrogatories until the one in hand was fully answered; nor were they allowed to depart after having heard an interrogatory read over until the examination thereto was perfected. (5) When the examination was completed, the deposition was read over and signed by the witness.²

§ 394. **Examination by commissioners.**—The successive steps in the examination of witnesses in chief by commissioners were substantially as follows: (1) After the cause was at issue an order of court was obtained, as of course, upon either petition or motion, by the plaintiff and defendant, either sep-

¹ 1 Smith's Ch. Prac. 356-361.

² 1 Smith's Ch. Prac. 356-359; 2 Daniell, 474-488.

arately or jointly, for a commission to examine witnesses; the commission, being a special writ, could not be issued without an order of court. (2) The order of the court authorizing the issuance of the commission did not name the commissioners, they being afterwards agreed upon by the solicitors of the parties, and the commission then issued to them, giving them the power to take the examination upon the interrogatories to be exhibited, none accompanying the commission. (3) Neither the order of the court allowing it nor the commission contained the names of the witness; but it gave the commissioners the power "to examine all witnesses whatsoever upon certain interrogatories to be exhibited" on behalf of the party obtaining the writ. (4) A commission could be taken out separately by both plaintiff and defendant, or they could take out a joint commission; in which latter case the commissioners were given the power to examine all witnesses for both parties. (5) As the commissioners were not officers of court, but were acting under a special writ, they were required to take and subscribe an oath, printed on a schedule attached to the commission, to execute the commission in the manner required by law; and their clerk was in like manner required to take an oath to perform his duties in the manner required by law. (6) As soon as the commissioners met and opened the commission, the solicitors for the parties produced their original and cross-interrogatories, and the witnesses were examined in the same manner as before an examiner, and the depositions certified and returned to the court.

§ 395. **Examination de bene esse.**—A witness in chancery was examined *de bene esse* by an examiner or by commissioners, according as he resided within twenty miles of London or at a greater distance; and there was in his examination nothing different from the examination of any other witness, it being upon written interrogatories, reduced to writing and signed by him and returned as any other deposition. But there was a material difference in the steps preparatory to an examination in chief and *de bene esse*. It was necessary to obtain the order of the court allowing the examination *de bene esse*, and also that the application for the order should be supported by an affi-

davit stating the facts relied upon as the ground thereof. The order and the commission, when one issued, authorized and directed the examination of the witness *nominatim*.¹

§ 396. Examination of witnesses abroad — Commissions and letters rogatory.— If a party to a suit pending in chancery in England had witnesses residing abroad whose testimony he desired to procure, he made motion upon notice in the cause pending for an order of the court for a commission or commissions for the examination of such witnesses in the country where they resided; such a commission might issue to take the depositions of witnesses in any country.² But if the testimony of a witness residing abroad was sought to be obtained for use in aid of, or in defense of, an action at law, it was necessary to file a bill in chancery to obtain the commission.³ In some countries the governments refuse to permit the execution, within their jurisdiction, of a commission to examine witnesses, issued by another country or government, upon the ground that it is an interference with the exercise of their own judicial powers; in such cases, letters rogatory, a process derived from the civil law, are issued to the government in whose jurisdiction the witnesses reside, to be executed by one of its own judges.⁴

(b) FEDERAL EQUITY PROCEDURE IN THE EXAMINATION OF WITNESSES.

§ 397. Mode of proof in equity prescribed by federal statutes and equity rules.— The federal statutes provide that: "The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, . . . the modes of . . . taking and obtaining evidence . . . to be used in suits in equity or admiralty by the circuit and district courts;"⁵ and that "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or here-

1 Smith's Ch. Prac. 506-510; 2 Battell, 6 Wend. 474; Nelson v. United States, 1 Pet. C. C. 236; Gason v. Daniell, 540-554.

² 1 Smith's Ch. Prac. 375.

Wadsworth, 2 Ves. 336.

³ 2 Daniell, 523.

⁵ U. S. R. S., sec. 917.

⁴ 1 Hoff. Ch. Prac. 482; Lincoln v.

after prescribed by the supreme court, except as herein specially provided.”¹ The federal statutes and the equity rules provide fully for the examination of witnesses in equity causes, and these provisions are pointed out in the sections immediately following.

§ 398. Three months allowed to take testimony.—An equity rule provides: “Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing.”² The three months are allowed for the taking of testimony by both parties; the limitation applies as much to the defendants as to the plaintiffs. The defendants are bound to proceed to take testimony as soon as the cause is at issue; they have no right to wait till the plaintiff is through taking his testimony. It is for the court or a judge to decide whether further time shall be given or refused to take testimony, and ordinarily the determination of the question would not be deemed a fit subject for review on appeal; but cases of so flagrant a character may occur, that it would be the duty of the appellate court to correct the error.³ The rule is imperative that no testimony taken after the period allowed shall be read at the hearing;⁴ but such evidence may be admitted in the discretion of the court.⁵

§ 399. Competency of witnesses in the United States courts. A federal statute provides that: “In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue to be tried: *Provided*, that in actions by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects the laws of

¹ U. S. R. S., sec. 862.

² Equity Rule 69.

³ Ingle v. Jones, 9 Wall. 486, 500.

⁴ Wooster v. Clark, 9 Fed. R. 854.

⁵ Fisher v. Hayes, 6 Fed. R. 76.

the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.”¹ In all cases not provided for by the statutes of the United States, the laws of the state in which the federal court sits constitute rules of decision as to the competency of witnesses in all actions at common law, in equity or in admiralty; it is, however, only in cases not provided for by the statutes of the United States that the laws of the state in which the federal court sits constitute rules of decision as to the competency of witnesses.² The last clause of the section of the federal statute³ above quoted, which makes the laws of the state the rules of decision as to the competency of witnesses in the courts of the United States in trials in equity “in all other respects,” means “in all other respects” than those provided for in so much of the section as precedes the word “provided,” and does not qualify the clause which forms the proviso.⁴ Where an administratrix brought a suit against the administrator of a deceased person and then resigned, and an administrator *de bonis non* was appointed, and upon his application was permitted to come in and prosecute the suit in the place of his predecessor who had resigned, upon the trial of such suit the former administratrix was a competent witness for her successor as to a transaction between herself and former husband with the intestate of the defendant administrator.⁵

§ 400. Two methods of examining witnesses *de bene esse*. In suits in equity in the circuit courts of the United States, there are two methods prescribed for examining witnesses *de bene esse*, viz.: 1. Without commission, and with or without notice, under act of congress.⁶ 2. By commission, and upon notice, under a United States equity rule.⁷

§ 401. Depositions *de bene esse* under act of congress.—Section 863 of the United States Revised Statutes provides that: “The testimony of any witness may be taken in any

¹ U. S. R. S., sec. 858.

⁵ *Snyder v. Fielder*, 139 U. S. 478,

² *Potter, Ex'r, v. Third National Bank of Chicago*, 102 U. S. 163, 167.

480.

³ U. S. R. S., sec. 858.

⁶ U. S. R. S., secs. 863, 864, 865.

⁷ Equity Rule 70.

⁴ *Goodwin v. Fox*, 129 U. S. 601, 641.

civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district courts shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.”¹

§ 402. Same — Manner of taking.—Section 864 of the United States Revised Statutes provides that: “Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate’s presence, and by

¹ U. S. R. S., sec. 863.

no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.”¹

§ 403. Same — Certificate and transmission.— And section 865 of the United States Revised Statutes provides that: “Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting; or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.”²

§ 404. Same — Statutes construed strictly.— The authority to take depositions in the manner allowed by the statutes stated in the three sections next preceding, being in derogation of the rules of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible. The conditions under which a party is permitted, and a magistrate is authorized, to take depositions *de bene esse* under this act are: (1) that the witness lives a greater distance from the place of trial than one hundred miles; or (2) is bound on a voyage to sea; or (3) is about to go out of the United States; or (4) is about to go out of the district to a greater distance from the place of trial than one hundred miles; or (5) is ancient or very infirm. The magistrate is required to deliver to the court, together with the depositions so taken, a certificate of the reasons of their being taken, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show that, at the time of the trial: (1) the witness is dead; or (2) gone out of the United

¹ U. S. R. S., sec. 864.

² U. S. R. S., sec. 866.

States; or (3) gone to a greater distance than one hundred miles from the place where the court is sitting; or (4) that by reason of age, sickness or bodily infirmity, or imprisonment, he is unable to travel and appear in court. The authority or jurisdiction conferred on the magistrate by this legislation is special, and confined within certain limits or conditions, and the facts calling for its exercise should appear upon the face of the instrument, and not be left to parol proof. The statute requires them to be certified by the magistrate. Where notice is required to be given to the opposite party, such notice should show on its face that the contingency happened which confers jurisdiction upon the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper for him to attend.¹

§ 405. Depositions de bene esse by commission under equity rule.—An equity rule provides that: “After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff’s witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.”² Depositions *de bene esse* taken abroad must be taken under this equity rule and cannot be taken under the act of congress, as the operation of that statute is restricted to depositions taken in the United States.³

§ 406. Four methods of examination in chief.—There are four methods prescribed for the examination of witnesses in chief, or after the cause is at issue, in suits in equity in the circuit courts of the United States, viz.: 1. Depositions “according to common usage,” under a *dedimus potestatem* or commission,

¹ Harris v. Wall, 7 How. 694; Bell v. Morris, 1 Pet. 351; Whitford v. Clark, 119 U. S. 522.

² Equity Rule 70.

³ Cortes Co. v. Tannhauser, 18 Fed. R. 667.

pursuant to the act of congress.¹ 2. Depositions by commission and accompanying interrogatories under the United States equity rules.² 3. Depositions by oral examination of the witnesses before an examiner of the court, pursuant to the United States equity rules.³ 4. By the oral examination of witnesses in open court on final hearing.⁴

§ 407. Depositions “according to common usage.”—The thirtieth section of the original judiciary act,⁵ as revised,⁶ provides that: “In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and . . . the provisions of sections 863, 864 and 865 shall not apply to any deposition to be taken under the authority of this section.” The phrase, “*dedimus potestatem*,” used in the act, is the special writ under which depositions are taken, and is most usually called a commission.⁷ Depositions taken under this section of the United States Revised Statutes are under no circumstances to be considered as taken *de bene esse*, whether the witnesses reside beyond the jurisdiction of the court or within it.⁸ The “common usage” mentioned in the statute signifies the usage or laws of the state where the federal court may be sitting, under which depositions are taken.⁹ This statute has not been repealed, nor superseded by the equity rules, but, on the contrary, it is recognized and supplemented by an equity rule promulgated in 1842, which provides that: “Testimony may also be taken in the cause, after it is at issue, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or a new deposition taken, under the acts

¹ U. S. R. S., sec. 866.

² Equity Rule 67.

³ Equity Rule 67.

⁴ Equity Rule 67.

⁵ 1 U. S. Stat. at L., ch. 20, sec. 30, pp. 89, 90.

⁶ U. S. R. S., sec. 866.

⁷ 3 Bl. Com. 447; Anderson's Dictionary of Law, title *Dedimus*.

⁸ *Sergeant's Lessee v. Biddle*, 4 Wheat. 508.

⁹ *Buddicum v. Kirk*, 3 Cranch, 393; *Warren v. Younger*, 18 Fed. R. 862; *Bischoffsheim v. Baltzer*, 10 Fed. R. 1; *United States v. Cameron*, 15 Fed. R. 794.

of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.”¹ The requirements of the procedure under the above section of the Revised Statutes and the equity rule by which it is supplemented are: (1) The deposition must be taken under a *dedimus potestatem* or commission. (2) The commission cannot issue until authorized by an order of the court. (3) The deposition must be taken according to common usage or the local laws. (4) If, according to common usage, a party is permitted to take a deposition without giving the adverse party notice of the time and place of taking the deposition, then he shall be entitled to cross-examine the witness, either under a commission or by a new deposition, as the court or a judge may deem proper. (5) Depositions taken under the act are in chief, and not *de bene esse*.

§ 408. Same — Act of congress of March 9, 1892.—By an act of congress approved March 9, 1892, it is provided: “That, in addition to the mode of taking the depositions of witnesses in causes pending at law or in equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.”² The only effect of this statute is to permit depositions to be taken according to the mode authorized by the state law; it adopts the mode or manner of taking depositions practiced in the state courts; but it has not enlarged or changed the conditions under which depositions may be taken in suits in the federal courts.³

§ 409. Depositions taken by commission under the equity rules.—“After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term time jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk’s office, ten days’ notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In

¹ Equity Rule 68; *Bischoffsheim Co.*, 69 Fed. R. 172; *National Cash-Register Co. v. Leland*, 77 Fed. R. 242; *v. Baltzer*, 10 Fed. R. 1.

² 27 U. S. Stat. at L., ch. 14, p. 7. *Despeaux v. Pennsylvania R. Co.*, 81

³ *Shellabarger v. Oliver*, 64 Fed. R. 897; *Texas & P. Ry. Co. v. 306; Mulcahey v. Lake Erie & W. R. Welder*, 92 Fed. R. 953.

all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.”¹ The last interrogatory accompanying the commission shall be: “Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.”² The witness must answer substantially all the interrogatories, including the general or last interrogatory, and if he does not it will be a fatal objection to the whole deposition.³ It is no objection to a deposition that the witness gives a material part of the evidence under the general interrogatory, instead of giving it in response to particular interrogatories. The regular practice is to propose particular interrogatories, so as to draw from the witness all that he may know about the matter specially inquired about, and then subjoin a general interrogatory as to any other material matter; and to this interrogatory the witness may give in evidence any matter which is pertinent to the cause, which he might have done if such matter had formed the subject of a particular interrogatory.⁴

§ 410. Oral examination of witnesses before an examiner.—The next method of examining witnesses in chief in suits in equity in the circuit courts of the United States, is by oral examination before an examiner. An equity rule provides that: “Either party may give notice to the other that he desires the evidence to be adduced in the case to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so requests, shall be furnished with a copy of the pleadings. Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and

¹ Equity Rule 67.

² Equity Rule 71.

³ Dodge v. Israel, 4 Wash. 323, Fed.

Cas. 3,952; Richardson v. Golden, 3 Wash. 109, Fed. Cas. 11,782.

⁴ Rhoades v. Selin, 4 Wash. 715, Fed. Cas. 11,740.

the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of questions put and answers given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative. At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court or is approved by the parties. The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that, if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just. In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause. When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of

record, in the same mode as prescribed in section 865 of the Revised Statutes. . . . Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown. The expense of the taking down of depositions by a stenographer, and of putting them into typewriting or other writing, shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.”¹ This rule, allowing the examination of witnesses orally before an examiner, is liberally construed by the courts. It was intended to authorize the appointment of examiners outside as well as inside the territorial jurisdiction of the court. The taking of the testimony before an examiner, orally, in the presence of the parties, is much more satisfactory than taking it by commission, and the rule should be construed so as to allow this to be done wherever a party desires it. The statutory mode of transmission adopted by the rule is that: Every deposition taken by an examiner shall be retained by the examiner taking it until he delivers it with his own hand into the court for which it is taken; or it shall be by him sealed up and directed to such court, and transmitted through the mail and remain under his seal until opened in court.³

§ 411. Oral examination of witnesses in open court on the final hearing.—In any suit in equity, “upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part of the evidence to be

¹ Equity Rule 67.

² *Western Division of Western North Carolina R. Co. v. Drew*, 3 Woods, 691, Fed. Cas. 17,434; *Johnson Steel Street Rail Co. v. North Branch Street Co.*, 48 Fed. R. 191;

Batt Refrigerator Co. v. Gillett, 28 Fed. R. 693; *In re Stewart*, 29 Fed. R. 813; *In re Spofford*, 62 Fed. R. 443.

³ U. S. R. S., sec. 865, referred to in equity rule 67 for mode of transmission.

adduced orally in open court on final hearing.¹ If witnesses are examined orally in open court, upon the final hearing, the testimony so adduced, in substance at least, should be written down at the time and made a part of the record; and if it is not so made a part of the record the appellate court will not, on appeal, consider any objection to its admission or exclusion by the trial court.²

§ 412. Procedure to compel attendance of witnesses before examiners and commissioners.—The procedure by which witnesses are compelled to appear and testify before examiners and commissioners is (1) by *subpœna ad testificandum*, and, (2) in case of disobedience to the subpœna, the process of contempt, enforced by a judge of the court within whose jurisdiction the examination is had. This procedure is very fully provided for by the equity rules and the federal statutes. The equity rule which authorizes the oral examination of witnesses before an examiner contains this provision: "In case of refusal of a witness to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories."³ Another equity rule provides: "Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court."⁴ And

¹ Equity Rule 67.

³ Equity Rule 67.

² *Blease v. Garlington*, 92 U. S. 1.

⁴ Equity Rule 78.

it is provided by a federal statute that: "When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court."¹ The courts of the United States are specially authorized by statute, to punish by fine and imprisonment, at their discretion, as a contempt of their authority, the disobedience or resistance "by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."²

§ 413. Procedure to compel production of books, writings and documents before examiners and commissioners.—The procedure to compel the production before examiners and commissioners of any writing, deed or books, by a witness is, (1) by subpoena *duces tecum*, and, (2) in case of disobedience to the subpoena, the process of contempt, enforced by a judge of the court within whose jurisdiction the examination is had. A federal statute provides that: When either party to the suit in which the testimony of the witnesses is to be taken applies to any judge of a United States court in such district or territory for a subpoena commanding the witness, therein to be named, to appear and testify before the "commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing, or written instrument, or book or other document, supposed

¹ U. S. R. S., sec. 868.

v. Plymouth County Dist. Ct., 134 U. S.

² U. S. R. S., sec. 725; Eilenbecker 31; Re Savin, 101 U. S. 267.

to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by the court. When such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or so much thereof as shall be required by either of the parties.”¹ Sections 866, 867, 869 and 870 of the United States Revised Statutes are, so far as they extend, controlling.²

§ 414. Distance witness may be required to travel for examination.—The United States Revised Statutes provide that: “No witness shall be required, under the provisions of either of” sections 868 and 869, which authorize the issuance of *subpœnas ad testificandum* and *subpœnas duces tecum*, to require witnesses to appear for examination under a commission issued by a court of the United States, “to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of said sections,

¹ U. S. R. S., sec. 869; In re Stewart, 29 Fed. R. 813; In re Spofford, 62 Fed. R. 443. And see also section 725, giving the courts of the United States power to punish, as for con-

tempt, witnesses and other persons disobeying any lawful writ, process, order, rule, decree or command of the said courts.

² Ex parte Fish, 113 U. S. 713.

unless his fee for going to, returning from, and one day's attendance at the place of examination, are paid or tendered to him at the time of the service of the subpoena."¹ The equity rule which provides for the attendance of witnesses before commissioners, examiners and masters imposes no restrictions as to the distance such witnesses may be required to travel, except that they must live in the district in which the examination is to be had; nor does the rule require the payment or tender of fees in advance.²

§ 415. *Bill in perpetuam rei memoriam*.—A bill *in perpetuam rei memoriam* is filed for the purpose of preserving the evidence of witnesses touching a matter which cannot be immediately investigated in a court of law, or where the evidence of a material witness is likely to be lost by death, or departure from the realm before the facts can be investigated. The bill is brought by a person in possession, having no opportunity to examine his witnesses at law, and the object of the bill is to preserve evidence for future litigation; it is in accordance with the Roman civil law in cases where any one foresaw that he might have occasion for proof by witnesses, and was apprehensive of their death before he should have occasion to use their testimony. A bill to perpetuate the testimony of witnesses should state the matter touching which the plaintiff desires to obtain evidence, and should show that he has some present interest in the subject-matter that may be endangered if the testimony in support of it should be lost; the bill should state that no action can be immediately brought, and pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated. The plaintiff compels the appearance of the defendant, and the suit is proceeded with in the usual manner to issue joined, and issuing a commission for the examination of witnesses, which is made out, executed and returned in the same manner as other commissions. The court will not permit the depositions taken under a commission to examine witnesses *in perpetuam rei memoriam* to be published, except in support of a suit or action, and then only after the death of the witness, or in case of his being sick or incapable of traveling.³ A federal statute

¹ U. S. R. S., sec. 870.

² Equity Rule 67.

³ Cooper's Eq. PL. 52-57; 1 Smith's Ch. Prac. 484-488.

provides that any circuit court of the United States, "upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States;" and that "any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof."¹

§ 416. Depositions in District of Columbia in suits pending elsewhere.—The Revised Statutes contain the following provisions:

"Sec. 871. When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any state or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said district specified.

"Sec. 872. When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia or to any commissioner for taking depositions appointed by said court—

"First. That any person within said district is a material witness for either party in a suit pending in any state or territorial or foreign court;

"Second. That no commission or notice to take the testimony of such witness has been issued or given; and

"Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence or consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons,

¹ U. S. R. S., secs. 866, 867.

requiring the witness to appear before him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit.

“Sec. 873. Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.

“Sec. 874. Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.”¹

§ 417. **Letters rogatory.**—When a foreign government refuses to suffer a commission to be executed within its jurisdiction, the circuit courts of the United States will issue letters rogatory to obtain the testimony of witnesses residing there; and, in such cases, where the examination of the witnesses is taken out of the hands of the persons appointed by the court, the ends of justice seem to require a departure, in some degree, from the ordinary rules of evidence.² “In some foreign countries, the government refuses to permit the commissioners to administer the oath to witnesses, considering it an interference with the proper judicial power. In such cases a course has been adopted, from a practice known in the civil law, of issuing what are termed letters rogatory, or, as they are sometimes called, requisitory. Of course, a special application would be necessary for an order for this purpose.”³

The following is the form of letters rogatory issued in the case cited: “United States. District Court of Pennsylvania. The President of the United States, to any Judge or Tribunal, having jurisdiction of civil causes at Havana, Greeting: Whereas

¹ U. S. R. S., secs. 871, 872, 873, 874.

³ Hoffman's Ch. Prac. 481, 482.

² Nelson v. United States, Pet. C. C.

235, Fed. Cas. 10,116.

a certain suit is pending before us in which John D. Nelson, Henry Abbott and Joseph E. Tatem are the claimants of the schooner *Perseverance* and cargo, and the United States of America are the defendants; and it has been suggested to us, that there are witnesses residing within your jurisdiction without whose testimony justice cannot completely be done between the parties, we therefore request you, that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you, or either of them, to appear before you, or some competent person to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations to the several interrogatories hereto annexed; and that you cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed, together with these presents. And we shall be ready and willing to do the same for you in a similar case when required. Witness," etc.¹

§ 418. Same — Federal statutory regulations.— Congress has established the following statutory regulations in regard to letters rogatory, namely:

"When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to

¹ *Nelson v. United States*, Pet. C. C. 235, Fed. Cas. 10,116; and see 3 Hoffman's Ch. Prac. 140, Form No. 163.

the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.¹

“The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, that when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons.²

“No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of

¹ U. S. R. S., sec. 875.

² U. S. R. S., sec. 4071.

the state or territory within which such examination is had, or any other, or any foreign state.¹

“If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section 4071, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States.”²

“Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.”³

§ 419. Examination to impeach the competency and credibility of a witness.—If a party to a suit in equity would object to the competency or credibility of a witness who has been examined in the cause against him, he must make a special application to the court, by petition, for liberty to exhibit articles, stating the facts and objections to the witness, and praying leave to examine other witnesses to establish the allegations in the articles by suitable proofs; and upon this petition leave is ordinarily granted.⁴ In Smith’s Chancery Practice the procedure upon this matter is stated as follows:

“By Lord Bacon’s seventy-second ordinance, no examination is to be had of the credit of any witness but by special order, which is sparingly to be granted. By Lord Clarendon’s order the examiner is not to examine any witnesses to invalidate the credit of any other witnesses, but by special order of the court, which is sparingly to be granted, and upon exceptions first put into writing and filed with the examiner. An order to examine to the credit of a witness may be obtained before publication has passed. And there is no precise time beyond which witnesses cannot be discredited. .

“The examination of witnesses as to credibility, whether before or after publication, can only be upon special application; therefore, evidence taken to that point upon the examination

¹ U. S. R. S., sec. 4072.

² U. S. R. S., sec. 4073.

³ U. S. R. S., sec. 4074.

⁴ Gass v. Stinson, 2 Sumn. 605, Fed. Cas. 5261; Wood v. Mann, 2 Sumn. 316, Fed. Cas. 17,953.

in chief was suppressed as impertinent. The order for leave to examine witnesses in support of articles exhibited to discredit a witness is made upon notice. . . .

“After publication has passed, the party may exhibit articles to discredit a witness who has been cross-examined, by proving that he is not to be believed upon oath; but he can only exhibit interrogatories to such particular facts as are not material to what is in issue in the cause; and is limited to the general question whether the witness is to be believed upon his oath. . . . The court will not allow articles to be exhibited against the competency of a witness after publication, but if the incompetency come to the knowledge of the party after publication, he may apply by motion to examine to that matter. . . . In equity an objection to the competency of a witness is not waived by cross-examining him. On objection to competency, the evidence is never read; if to credit only, the evidence is read, and left to the consideration of the court.”¹ “Evidence to impeach credit is in one shape or other admitted into almost every system of jurisprudence. One of the grievances in the star chamber was that they would not allow it there. It was at that time, and still continues, frequent in the ecclesiastical courts. At common law a party may bring forward witnesses to swear that they would not believe the oath of an adverse witness who has given his testimony, or that they have heard him at other times represent differently some fact to which he has sworn; but in the latter case the most ample notice possible must have been given to him, in his cross-examination, as to the particular points upon which witnesses are about to be called to contradict him. In equity the different form of the proceeding causes a considerable difference in the process of impeaching credit. . . . Instead of requiring a cross-examination as a preliminary, the courts of equity require articles, or exceptions, to be filed, and a special motion to be made upon a certificate of that having been done.”²

The articles should state the facts which it is proposed to be proved to discredit the witness.³

§ 420. Demurrer to answering interrogatories.—If a witness has any valid objection to making answer to an interroga-

¹ 1 Smith's Ch. Prac. 398-400.

³ Gresley's Eq. Ev. 206, 207.

² Gresley's Eq. Ev. 204, 205.

tory, or any part of an interrogatory, he should state such objections in the form of a demurrer, which should be taken down in writing by the examiner or commissioner taking the deposition.¹ The validity of the objections to answering may be brought to the attention of the court and passed upon by it, by process of contempt against the witness to compel him to answer,² or by the examiner or commissioner certifying the demurrer to the court and setting it down for argument.³

§ 421. Motions to suppress depositions.—If depositions are scandalous and impertinent, or if the interrogatories are leading, or if there has been any material irregularity in the execution and return of the commission, they may, on motion, be suppressed.⁴ But depositions will not be suppressed for slight and immaterial errors which are not prejudicial to the parties.⁵

§ 422. Re-examination of witnesses.—When the deposition of a witness has been suppressed upon the ground of an unintentional irregularity in taking it, or when the witness has made an inadvertent omission in answering, or when the commissioner or examiner taking the testimony has made a mistake, or has failed to write down any material part of the testimony of a witness, such witness may be re-examined, if the court shall be of opinion that such re-examination is necessary to the ends of justice; but an order of the court is necessary to authorize such re-examination.⁶

(c) DOCUMENTARY EVIDENCE.

§ 423. Judgments and decrees conclusive evidence, when. A final judgment at law, or a final decree in equity, rendered by a court of competent jurisdiction, and having jurisdiction of the parties and the subject-matter, is conclusive evidence of every question which was or might have been presented and determined in such suit, when offered in evidence in a second

¹ 1 Smith's Ch. Prac. 383, 384.

² U. S. R. S., secs. 868, 869; In re Stewart, 29 Fed. R. 813; In re Spofford, 62 Fed. R. 443; Equity Rule 78.

³ 1 Smith's Ch. Prac. 383, 384.

⁴ 1 Smith's Ch. Prac. 392.

⁵ Bibb v. Allen, 149 U. S. 981; Gormley v. Bunyan, 138 U. S. 623.

⁶ 1 Smith's Ch. Prac. 349, 397; 2 Daniell, 582-592; Tamlyn's Eq. Ev. 55-57; Thurber v. Cecil Nat. Bank, 52 Fed. R. 573.

suit upon the same cause of action, and between the same parties or their privies; but if the second suit is upon a different cause of action, though between the same parties or their privies, the judgment is conclusive evidence in the second suit only as to the question actually litigated and determined in the first suit.¹

§ 424. Judgments of other states entitled to full faith and credit.— At the time of the Revolution and the organization of the federal government, the law, as to the credit, validity and effect which should be given by one state or country to the judgments of the courts of another state or country, was in a very unsettled condition. In this country, as between the colonies, such judgments were regarded as only *prima facie* evidence of the rights decided by them, and subject to be inquired into by plea when sued on in another state. "It was most reasonable, on general principles and justice, that among states and their citizens united as" the colonies were to be under the new government, that "judgments rendered in one state should bind citizens of other states, where defendants had been served with process, or voluntarily made defense."² With this policy in view, and to remedy the defects of the old law, the matter was made the subject of a constitutional provision, namely: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof."³

Pursuant to this constitutional provision, congress enacted two statutes upon the subject, one approved May 26, 1790,⁴ and the other approved March 27, 1804,⁵ and which, as carried into the Revised Statutes,⁶ are as follows: "The acts of the legis-

¹ Nesbit v. Independent District of Riverside, 144 U. S. 610, 621; Cromwell v. Sac County, 94 U. S. 351; Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279, 302; Keokuk & W. R. Co. v. State of Wisconsin, 152 U. S. 303, 313; Roberts v. Northern Pacific R. Co., 158 U. S. 130; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 696; Thompson v. Roberts, 24 How. 233; Hopkins v.

Lee, 6 Wheat. 109; W. A. & G. Packet Co. v. Sickles, 24 How. 333; Mutual L. Ins. Co. of N. Y. v. Harris, 97 U. S. 331; *ante*, §§ 278, 279, 280.

² D'Arcy v. Ketchum, 11 How. 165, 175; McElmoyle v. Cohen, 13 Pet. 312.

³ U. S. Const., art. IV, § 1.

⁴ 1 U. S. Stat. at L., ch. 11, p. 122.

⁵ 2 U. S. Stat. at L., ch. 56, pp. 298, 299.

⁶ U. S. R. S., sec. 905.

lature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The purpose of these constitutional and statutory provisions was to determine the weight and effect, *as evidence*, of a judgment of the courts of one state, when made the foundation of a new suit in the courts of another state; the purpose was to establish a *rule of evidence*; and, while there has been some conflict in the opinions delivered from time to time by the supreme court of the United States, in the adjudicated cases, the result of all of those cases is, to establish the following rule of evidence, viz.:

That a judgment pronounced and rendered by a court of competent jurisdiction, having jurisdiction of the subject-matter and of the parties, shall, when exemplified according to the act of congress, have the same weight, credit, validity and effect, *as evidence*, in every other state, that it has in the state where it is pronounced and rendered; but the court in which the judgment is presented as evidence shall always have the power to inquire whether or not the court which pronounced and entered it had jurisdiction of the subject-matter and of the parties affected by it.¹ But congress has not undertaken

¹ *Hampton v. McConnell*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312; *D'Arcy v. Ketchum*, 11 How. 165; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 300; *Hanley v. Donoghue*, 116 U. S. 1, 4; *Cade v. Cunningham*, 133 U. S. 107, 138; *Maxwell v. Stewart*, 22 Wall. 77; *Insurance Co. v. Harris*, 97 U. S. 331; *Green v. Van Buskirk*, 7 Wall. 139; *Cooper v. Reynolds*, 10 Wall. 308; *Christmas v. Russell*, 5 Wall. 290; *Thompson v. Whitman*, 18 Wall. 454; *Knowles v. Gas Light & Coke Co.*, 19 Wall. 58; *Settlemier v. Sullivan*, 97 U. S. 444; *Grover & B. Sewing Machine Co. v. Radcliff*, 137 U. S. 287; *Carpenter v.*

to prescribe in what manner the effect of such judgments in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject; and whenever it becomes necessary for a court of one state to ascertain the effect that a judgment has in the courts of another state in which it was rendered, in order to give it full faith and credit, the law of the state in which the judgment was rendered must be proved like any other matter of fact.¹ The federal courts are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them.²

§ 425. Foreign judgments — Their weight as evidence controlled by the rule of reciprocity.— When foreign judgments and decrees are sued on in the courts of this country, their weight as evidence is controlled by the rule of reciprocity, which rule is a part of international law; and, therefore, a judgment rendered in France, by whose laws the judgments of the courts of this country are reviewable upon their merits, is not entitled to full credit and conclusive effect when sued upon in this country, but is *prima facie* evidence only of the justice of the plaintiff's claim.³ But a judgment rendered in Canada by a court of competent jurisdiction, and having jurisdiction of the parties and the subject-matter, rendered upon regular proceedings and due notice, and not procured by fraud, is, when sued upon in this country, conclusive evidence of the matters therein determined, because, by the law of England, prevailing in Canada, a judgment rendered by an American

Strange, 141 U. S. 87; Simons v. Saul, 138 U. S. 439; Reynolds v. Stockton, 140 U. S. 254; Huntington v. Attrill, 146 U. S. 657.

¹ Hanley v. Donoghue, 116 U. S. 1, 7; Scott v. Coleman, 5 Litt. 349; Thomas v. Robinson, 3 Wend. 267; Shelden v. Hopkins, 7 Wend. 435; Van Buskirk v. Mulock, 3 Harr.

(N. J.) 184; Elliott v. Ray, 2 Blackf. 31; Cone v. Catton, 2 Blackf. 82; Snyder v. Snyder, 25 Ind. 399; Pelton v. Platner, 13 Ohio, 209; Horton v. Critchfield, 18 Ill. 133; Rape v. Heaton, 9 Wis. 328; Crafts v. Clark, 31 Iowa, 77; Taylor v. Barron, 35 N. H. 484; Knapp v. Abell, 10 Allen, 485; Mowry v. Chase, 100 Mass. 79; Wright v. Andrews, 130 Mass. 149; Bank of United States v. Merchants' Bank, 7 Gill, 415, 431; Coates v. Mackey, 56 Md. 416, 419.

² Pennoyer v. Neff, 95 U. S. 714, 748; Chicago, etc. R. Co. v. Wiggins Ferry Co., 108 U. S. 18; Chase v. Curtis, 103 U. S. 452; Mills v. Duryee, 7 Cranch, 480.

³ Hilton v. Guyot, 159 U. S. 162-229.

court under like circumstances would be allowed full and conclusive effect when sued on in that country.¹

§ 426. Parol evidence admissible to show the precise question determined by a former judgment or decree.—It is undoubtedly the settled law, that a judgment of a court of competent jurisdiction, upon a question directly involved in a suit, is conclusive as to that question in another suit between the same parties; but, to give such judgment this effect, it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. And, when such judgment is offered

¹ *Ritchie v. McMullen*, 159 U. S. 240-243.

In *Hilton v. Guyot*, *supra*, Justice Gray, after an exhaustive examination of the authorities upon the credit and effect to be given to foreign judgments, said:

"The prediction of Mr. Justice Story (in § 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

"The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim.

"In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of interna-

tional law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

"By our law, at the time of the adoption of the constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more. . . .

"In the courts of nearly every other nation, it" (the judgment) "would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France." 159 U. S. 227, 228.

in evidence in a second suit between the same parties, if there be any doubt or uncertainty from the record, as to the precise question or questions raised and determined in the former suit, such doubt and uncertainty may be removed by parol or other extrinsic evidence. To apply the judgment rendered in the former suit, and give effect to the adjudication actually made, when the record leaves the matter in doubt, parol evidence is admissible.¹

§ 427. Judgments and decrees as muniments of title to real estate.— While it is true, as a general rule, that judgments and decrees are evidence only in suits between parties and privies to the former suit in which the judgment or decree was rendered, yet this rule is wholly inapplicable to a case where a decree is not introduced as *per se* binding upon any rights of the adverse party, but is introduced by one who is a purchaser of real estate at a judicial sale, as a muniment of title.²

§ 428. Docket entries evidence of receipt of money by United States marshal.— Entries made by a United States marshal or his deputies, upon the dockets of the court, of the receipt of money collected by the marshal, upon judgments rendered by the court, are competent evidence against the sureties of the marshal, in a suit on his official bond for the money so collected.³

§ 429. Authentication of judgments.— The form and manner of the authentication of judgments prescribed by act of congress is as follows: "The records and judicial proceedings of the courts of any state or territory, or of any such country" (meaning "any country subject to the jurisdiction of the United States"), "shall be proved or admitted in any court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the

Campbell v. Rankin, 99 U. S. 261; Steam Packet Co. v. Sickles, 24 How. 333.

Russell v. Place, 94 U. S. 606; Cromwell v. Sac County, 94 U. S. 351; ²Barr v. Gratz, 4 Wheat. 213; Davis v. Brown, 94 U. S. 423; Wash- Webb v. Den, 17 How. 577.

ington, Alexandria & Georgetown ³Williams v. United States, 1 How. 290.

said attestation is in due form.”¹ A substantial compliance with this statute is sufficient.²

§ 430. Authentication of foreign judgments.—“Foreign judgments are authenticated: 1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate itself must be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received.”³

§ 431. Authentication of legislative acts.—“The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed hereto.”⁴ Under and by virtue of this act of congress, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts, in the courts of other states, and of the Union. No other or further formality is required; and the seal itself is supposed to import absolute verity. The annexation of the seal must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof, and competent authority to do the act.⁵ Copies of the journals of either house of a state legislature, certified by the secretary of state, and the printed journals thereof, published in obedience to law, are both competent evidence of the proceedings in the legislature.⁶ The authentication of legislative acts, provided for by act of congress, was intended as evidence only of the existence of such acts, and not to give them any greater validity or effect than that which they had in the state from which they are accredited; it merely provides a mode of proving public acts and records.⁷

¹ U. S. R. S., sec. 905.

² *Carpenter v. Strange*, 141 U. S. 87, 106; *Maxwell v. Stewart*, 22 Wall. 77.

³ *Marshall, C. J.*, in *Church v. Hubbard*, 2 Cranch, 187. And see also *Ennis v. Smith*, 14 How. 400.

⁴ U. S. R. S., sec. 905.

⁵ *United States v. Johns*, 4 Dall. 412; *United States v. Amedy*, 11 Wheat. 392.

⁶ *Post v. Supervisors*, 105 U. S. 668.

⁷ *Town of South Ottawa v. Perkins*, 94 U. S. 260.

§ 432. Authentication of foreign laws.—A foreign written law may be received as authentic, when it is found in a statute book, with proof that the book has been officially published by the government which made the law. As to the manner of authenticating a foreign law, there is no rule except this: that no proof shall be received, which presupposes better testimony behind, and attainable by the party. Such law may be verified by an oath, or by an exemplification of a copy, under the great seal of a state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized by law to give the copy, which certificate must be duly proved. The unwritten law of a foreign nation must be proved by the parol testimony of expert witnesses. The rule of the supreme court of the United States is, that the laws of a foreign country, designed only for the direction of its own affairs, are not to be noticed by other countries, unless proved as facts; and, that the sanction of an oath is required for their establishment, unless they can be verified by some other such high authority, which the law respects not less than the oath of an individual.¹

§ 433. Proof of records from other states kept in offices not appertaining to courts.—“All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, or territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the

¹ *Ennis v. Smith*, 14 How. 400; *Church v. Hubbard*, 2 Cranch, 187.

great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken.”¹

§ 434. Copies of records of the general land office.—

“Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equal with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such records.”² And “the commissioner of the general land office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in courts of justice.”³ The record in the volume kept in the general land office at Washington for the recording of patents for land issued by the United States, is evidence of the grant, but is not the grant itself; such record is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant has been issued, and the same defenses can be made against the record which could be made against the patent itself.⁴ Certified copies from the land office at Washington, concerning the location of land warrants, are admissible in evidence, equally with the originals.⁵ The words, “evidence equally with the originals,” as used in the act of congress, were not intended to mean that in all cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary.⁶

¹ U. S. R. S., sec. 906.

² U. S. R. S., sec. 891.

³ U. S. R. S., sec. 2469.

⁴ McGarrahan v. Mining Co., 96 U. S. 316.

⁵ Culver v. Uthe, 133 U. S. 655.

⁶ Campbell v. Laclede Gas Co., 119 U. S. 445.

§ 435. Copies of foreign laws and records relating to land titles in the United States.—"It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the solicitor of the treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals."¹

§ 436. Copies of department records and papers.—"Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."²

§ 437. Copies of records and documents in the office of the solicitor of the treasury.—"Copies of any documents, records, books, or papers in the office of the solicitor of the treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals."³

§ 438. Copies of instruments and papers in the comptroller's office.—"Every certificate, assignment, and conveyance executed by the comptroller of the currency, in pursuance of law, and sealed with his seal of office, shall be received in

¹ U. S. R. S., sec. 907.

² U. S. R. S., sec. 882.

³ U. S. R. S., sec. 883.

evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.”¹

§ 439. Copies of organization certificates of national banks.

“Copies of the organization certificate of any national banking association, duly certified by the comptroller of the currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.”²

§ 440. Transcripts from books of the treasury department.—“When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *Provided*, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require

¹ U. S. R. S., sec. 884.

² U. S. R. S., sec. 885.

the production of the original bond, contract, or other paper specified in such affidavit.”¹

§ 441. Copies of postoffice records and of auditor's statement of accounts.—“Copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money order account books of the postoffice department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.”²

§ 442. Copies of statements of demands by the postoffice department.—“In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the postmaster-general or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.”³

§ 443. Copies of the records of the patent office.—“Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters-patent authenti-

¹ U. S. R. S., sec. 886.

² U. S. R. S., sec. 889.

³ U. S. R. S., sec. 890.

cated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof.”¹

§ 444. Copies of foreign letters-patent.—“Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters-patent, and of the date and contents thereof.”²

§ 445. Printed copies of specifications and drawings of patents.—“The printed copies of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the states and territories, and in the clerk’s offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained.”³

§ 446. Extracts from the journals of congress.—“Extracts from the journals of the senate, or of the house of representatives, and of the executive journal of the senate when the injunction of secrecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.”⁴

§ 447. Copies of records in the offices of consuls and commercial agents.—“Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.”⁵

¹ U. S. R. S., sec. 892.

² U. S. R. S., sec. 893.

³ U. S. R. S., sec. 894.

⁴ U. S. R. S., sec. 895.

⁵ U. S. R. S., secs. 896, 1707.

§ 448. Little & Brown's edition of the United States statutes and treaties to be evidence.—“The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof.”¹

§ 449. Proof of the execution of deeds and other private writings.—It is a rule of evidence in courts of common law and equity, that if a party relies upon a deed as evidence to support his suit or defense, he must produce in evidence the original deed, and prove its execution; he must prove (1) the execution of the deed, (2) its delivery, and (3) the identity of the grantor in the deed.² If the deed is not attested by subscribing witnesses, its execution and delivery are proved by proof of the signature of the grantor; but where the execution of a deed is attested by subscribing witnesses, the execution and delivery of the deed and the identity of the grantor should be proved by the evidence of the subscribing witnesses, if they are alive and can be produced;³ and the proof of these facts by the testimony of one subscribing witness, where there are several, is sufficient.⁴

§ 450. Same — Secondary evidence of execution.—Where the attesting witness “is dead, or cannot be found, or is without the jurisdiction of the court, or is otherwise incapable of being produced, the next best secondary evidence is the proof

¹ U. S. R. S., sec. 908; 18 U. S. Stat. at L., ch. 333, sec. 8, p. 114; 21 U. S. Stat. at L., Joint Resolution, p. 308; 26 U. S. Stat. at L., ch. 73, sec. 3, p. 50.

² Gresley's Eq. Ev. 98, 120, 121; 1 Gilbert's Law of Ev. 83, 84, 88; Frances v. Hazelrig, 1 A. K. Marsh. (Ky.) 93; Clark v. Courtney, 5 Pet. 319; Stebbins v. Duncan, 108 U. S. 32; Hanrick v. Patrick, 119 U. S. 156; Stampers v. Griffin, 20 Ga. 312; Beverly v. Burke, 9 Ga. 440; Williams v. Keyser, 11 Fla. 234.

³ Gresley's Eq. Ev. 119, 120; Clark v. Courtney, 5 Pet. 341; Whitaker v. Salisbury, 15 Pick. 534; International & Great Northern Ry. Co. v. McRae, 82 Tex. 614; McPherson v. Rathbone, 11 Wend. 96; Jackson v. Waldron, 13 Wend. 178; Willoughby v. Carlton, 9 Johns. 136.

⁴ 1 Gilbert's Ev. 83; Gresley's Eq. Ev. 120; Stebbins v. Duncan, 108 U. S. 32; Hanrick v. Patrick, 119 U. S. 156.

of his handwriting; and that, when proved, affords *prima facie* evidence of a due execution of the instrument, for it is presumed that he would not have subscribed his name to a false attestation. If, upon due search and inquiry, no one can be found who can prove his handwriting, there is no doubt that resort may then be had to proof of the handwriting of the party who executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence. Whatever may have been the origin of this rule, and in whatever reasons it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness.¹ When the execution of a deed or other private writing is to be authenticated by proof of the handwriting of the subscribing witnesses, proof of the handwriting of one witness will be sufficient.²

§ 451. Exceptions to the rule requiring proof of execution of private writings — Ancient instruments.— There are some well-established exceptions to the rule of evidence requiring proof of the execution of deeds and private writings, and one of the exceptions is as to ancient instruments. This exception has been stated by the United States supreme court in the following language: "The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years,

¹ Clark v. Courtney, 5 Pet. 318, 341, 342, 343, 344; Williams v. Keyser, 11 Fla. 234; Cox v. Davis, 17 Ala. 714; Mardis v. Schackeford, 4 Ala. 503; Lazus v. Lewis, 5 Ala. 457; Watts v. Kilbourn, 7 Ga. 356; Settle v. Alison, 8 Ga. 201; Coody v. Gress Lumber Co., 82 Ga. 793; Hudson v. Puett, 86 Ga. 341; Richmond & Danville Ry. Co. v. Jones, 92 Ala. 218; McPherson v. Rathbone, 11 Wend. 96; Jackson v. Waldron, 13 Wend. 178; Wiloughby v. Carlton, 9 Johns. 136; Whitaker v. Salisbury, 15 Pick. 534; Jackson v. Gager, 5 Cow. 383; I. & G. N. Ry. Co. v. McRae, 82 Tex. 614; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429; Spring v. Insurance Co., 8 Wheat. 269; Howard v. Snelling, 32 Ga. 195; Prince v. Blackburn, 2 East, 250; Jackson v. Chamberlain, 8 Wend. 620; Henry v. Bishop, 2 Wend. 575; Foote v. Cobb, 18 Ala. 585; Robertson v. Allen, 16 Ala. 106; Bennett v. Taylor, 9 Ves. 381; Tinnin v. Price, 31 Miss. 422; Goss v. Tracy, 1 P. Wms. 286; Traedor v. Hyams, 153 Mass. 536; Stebbins v. Duncan, 108 U. S. 32; Hanrick v. Patrick, 119 U. S. 156.

² Stebbins v. Duncan, 108 U. S. 32; Hanrick v. Patrick, 119 U. S. 156.

when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion.”¹ Possession under an ancient deed is always sufficient, as preliminary proof, to authorize the deed to be read in evidence without proof of execution, but such possession is not indispensable. An ancient deed may be introduced in evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, where no evidence justifying suspicion of its genuineness is shown, and it is found in custody of those legally entitled to it.² When ancient deeds are found among the file papers in a suit in a court of record of the county where the lands to which they refer are situated, in the custody of an officer charged by law with the care and safekeeping of the records of such court, and it appears that such deeds were filed in such court for a necessary and proper use in such suit, the record in such suit is admissible in evidence against persons not parties or privies, to prove the collateral fact of the antiquity of the original deeds offered in evidence, and to account for their custody.³

§ 452. Same — When the deed is produced by the adverse party claiming an interest under it.— Where the adverse party, pursuant to a legal duty, produces a deed, and claims a beneficial interest under it in the same suit, he thereby admits its execution and dispenses with further proof thereof; but the admission of the execution results from such privity of interest,

¹ Applegate v. Lexington & Carter County Mining Co., 117 U. S. 255.

² Applegate v. Lexington & Carter County Mining Co., 117 U. S. 255; Barr v. Gratz, 4 Wheat. 213; Winn v. Patterson, 9 Pet. 663; Stoddard v. Chambers, 2 How. 284; Caruthers v. Eldredge, 12 Gratt. 670; Harlan v.

Howard, 79 Ky. 373; Jackson v. Laroway, 3 Johns. Cas. 283; Hewlet v. Cock, 7 Wend. 371; Jackson v. Luquere, 5 Cowen, 221; Fulkerson v. Holmes, 117 U. S. 389.

³ Applegate v. Lexington & Carter County Mining Co., 117 U. S. 255; Barr v. Gratz, 4 Wheat. 213.

and not because of the possession of the instrument by the party against whom it is offered.¹

§ 453. Same — When defendant by his answer admits the execution.— When a deed or other private writing is directly put in issue by a bill in equity, and the defendant, in his answer, for the purposes of the suit, distinctly admits the execution of the deed, such admission is, for all purposes of that suit, conclusive upon the defendant, operating as an estoppel to the introduction of conflicting testimony, and dispenses with the necessity of any proof of execution.²

§ 454. Proof of the execution of wills and testaments devising real estate at common law.— At common law a will devising land is in the nature of a conveyance; an acquisition of land by devise is an acquisition by purchase. The ecclesiastical courts of England had no power to authenticate a will devising real estate; and until the enactment of a recent statute there was no provision in the law of England for the probate of wills of real estate by the probate courts; prior to recent legislation in England, if the ecclesiastical courts admitted to probate a will disposing of both personal and real property, the decree of probate, in so far as the real estate was concerned, was *coram non judice* and void. At common law, in an action of ejectment by the devisee against the heir-at-law, the plaintiff was required to produce the original will in court upon the trial and prove its execution by at least one witness in the same manner that proof was made at common law of the execution of deeds and other private writings. At law a single witness was sufficient to prove all the requisites of the execution of a will and testament devising real estate, although the statute of frauds enacted that wills “shall be in writing, and signed by the deviser, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the deviser by three or four credible witnesses.” But in proving a will devising

¹ Rhodes v. Selin, 4 Wash. 715, Fed. Cas. 11,740; Williams v. Keyser, 11 Fla. 234; Gresley's Eq. Ev. 118; Pearce v. Hooper, 3 Taunt. 60; Orr v. Morris, 3 Bro. & Bing, 139; Jackson v. Kings-

ley, 17 Johns. 158; Herring v. Rogers, 30 Ga. 615; McGregor v. Wait, 10 Gray, 72.

² Gresley's Eq. Ev. 9, 10, 119, 120; Smith v. Gale, 144 U. S. 509.

real estate, in chancery, against the heir-at-law, the rule was more strict and rigid. In equity, in order to prove the will against the heir, it was required that all the witnesses should be examined; if a witness was dead, or insane, or abroad, or had not been heard from for many years and could not be found, his evidence was dispensed with, and it was sufficient to prove his handwriting. In equity, where the object and purpose of the suit were to establish a will against the heir, it was necessary to prove: (1) The due execution of the will; and (2) the sanity of the testator. Lord Camden, speaking of the requisite proof of a will devising real estate, in equity, against the heir, said: "Sanity is the great fact the witness is to speak to when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in chancery, though a deed may be; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor." Although, upon a bill in equity to establish the will against the heir, such will may have been clearly proved by the depositions of the witnesses, upon interrogatories, according to the methods of obtaining evidence in suits in equity, still the heir-at-law could claim as a right an issue *devisavit vel non*, sent for trial before a jury in a court of common law; and, upon such trial before the jury, he had the right to have the original will produced and all the attesting witnesses examined, except such as were dead, or insane, or abroad, or had not been heard from for many years and could not be found, in which case the evidence of such witness was dispensed with, it being sufficient to prove his handwriting.¹ A will and testament thirty years old, reckoning from its date, was at common law admitted in evidence without proof of execution.²

¹ 2 Daniell, 436, 437, 438, 439; Gresley's Eq. Ev. 124, 125; Darby v. Jaunce v. Thorne, 2 Barb. Ch. (N. Y.) 40.
² 2 Daniell, 435, 436; Gresley's Eq. Ev. 124, 125.

§ 455. The courts of the United States have no jurisdiction to take proof of the execution of wills and testaments. The courts of the United States have no probate jurisdiction, nor any jurisdiction to take and receive the proof of the execution of wills and testaments; and they must receive the judgments, sentences and decrees of the state probate courts to which the jurisdiction over testamentary matters is committed, as conclusive of the execution, validity and contents of wills and testaments.¹

§ 456. Proof of the execution and contents of lost instruments.—The general rule of evidence is that, if a party intends to use a deed or any other private instrument in evidence, he ought to produce the original, if he has it in his possession, or can compel its production; but if the instrument be in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original be lost or destroyed, secondary evidence, which is the best that the nature of the case will allow, will, in such case, be admitted. The party, after proving any of those circumstances to account for the absence of the original, may read a counterpart, or, if there be no counterpart, an examined copy, or, if there should not be an examined copy, he may give parol evidence of the contents. Where a writing has been voluntarily destroyed with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such case the secondary evidence ought not to be received on behalf of the party in default; but where the destruction happens through mistake or accident, the party destroying the instrument cannot be charged with default.² But the execution of a lost deed must be proved in the same manner that the execution of other deeds is proved.³ The rule that the loss of a paper ought to be established before its contents can be proved is well settled and ought to be maintained.⁴

¹Gaines v. Chew, 2 How. 619; Fourvergne v. City of New Orleans, 18 How. 470; Case of Broderick's Will, 21 Wall. 503; Ellis v. Davis, 109 U. S. 485; Simmons v. Saul, 138 U. S. 439.

²Riggs v. Tayloe, 9 Wheat. 483; Renner v. Bank of Columbia, 9 Wheat. 581; Seabee v. Dorr, 9 Wheat. 558; Stebbins v. Duncan, 108 U. S. 32.

³Stebbins v. Duncan, 108 U. S. 32.

⁴Bouldin v. Massie, 7 Wheat. 122; Minor v. Tillotson, 7 Pet. 99; Dwyer v. Dunbar, 5 Wall. 318.

§ 457. **Same — Lost will.**— A lost, suppressed or spoliated will of real estate comes within the rule, and secondary evidence is admissible to establish its execution and contents, and secure its probate by the court having the proper and competent jurisdiction. “If a will, duly executed and not revoked, is lost, destroyed or mislaid, either in the life-time of the testator, without his knowledge, or after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed or mislaid, and also of its contents.” “But to entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence.”¹

§ 458. **Same — Judicial records.**—“It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule.”²

§ 459. **Same — Lost deposition.**— Where a deposition has been lost without the fault of the party claiming the benefit of it, he is not required to supply its place by retaking the deposition of the witness, but may adduce secondary evidence of its contents.³

§ 460. **Same — When the instrument is beyond the jurisdiction of the court.**— The supreme court of the United States has declared that: “It is well settled that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.”⁴

§ 461. **Proof of exhibits, viva voce, at the hearing.**— It was a rule of the High Court of Chancery of England, as ancient as the court itself, that the court would not receive oral

¹ *Gaines v. Hennen*, 24 How. 556— *Hogan v. Kurtz*, 94 U. S. 773; *United States v. Castro*, 24 How. 346.

² *Burton v. Driggs*, 20 Wall. 125; ³ *Burton v. Driggs*, 20 Wall. 125.

⁴ *Burton v. Driggs*, 20 Wall. 125.

testimony at the hearing; but to this rule there was one well-established exception, viz.: the court would permit an examination *viva voce* at the hearing to prove exhibits.¹ Upon this subject Mr. Daniell states the practice as follows: "An examination *viva voce* at the hearing is admitted where written documents essential to the justice of the cause have been neglected to be proved before publication has passed in the suit, or where the plaintiff, finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. The defendant's answer in such case being taken as true, no examination of witnesses is requisite; the proof, therefore, of the documents referred to in the pleadings, when such proof is necessary, must be by witnesses *viva voce* at the hearing. . . . Deeds, bonds or other instruments which require proof of their due execution by a subscribing witness or witnesses, or promissory notes, bills of exchange, letters or receipts, of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits which may be proved *viva voce*. It is to be observed that, with the exception of documents coming out of the hand of a public officer having the care of such documents (which are proved by the mere examination of the officer to that fact), no exhibit can be proved *viva voce* at the hearing that requires more than the proof of the execution, or of handwriting to substantiate it; if it be anything that admits of cross-examination or that requires any evidence besides that of handwriting, it cannot be received. This rule is strictly adhered to. . . . Where a deed was offered in evidence the subscribing witnesses to which were dead, and witnesses were produced at the hearing to prove the handwriting of such witnesses, they were not allowed to be examined, because something more, viz., the death of the witnesses, was necessary to be proved. For the same reason a will of real estate cannot be proved *viva voce*, because, besides the mere execution of the will, the sanity of the testator must be established. . . . If a document is impeached by the answer

¹ 2 Daniell, 441-445; Gresley's Eq. Johns. Ch. 481; 1 Hoff. Ch. Prac. 490; Ev. 126-129; 1 Smith's Ch. Prac. 414, Barrow v. Rhinelander, 1 Johns. Ch. 415; Wood v. Mann, 2 Sumn. 316, Fed. 559. Cas. 17,953; Consequa v. Fanning, 2

of a defendant it cannot be proved *viva voce* on the part of the plaintiff against such defendant. . . It is only, however, where the execution or the authenticity of a deed is impeached that it cannot be proved *viva voce*; if the validity of it only is disputed it may be so proved. It is to be observed that the refusing a party liberty to prove exhibits *viva voce* at the hearing of a cause in equity, where it can be done, is irregular and unprecedented. It is, however, necessary, in order to authorize the examination of a witness *viva voce* at the hearing of a cause, that the party intending to make use of the exhibits should previously obtain an order for that purpose. This order is never made on the application of the contrary party, but may be obtained by the party requiring it, by motion in court without notice; and it is often granted during the hearing of the cause; in which case the cause will be ordered to stand over for the purpose of enabling the order to be served and acted upon. The order, when drawn up, must describe the exhibits to be proved; and it is always made as of course, 'saving all just exceptions.' The order being drawn up, passed and entered, a copy thereof must be served in the usual manner upon the adverse clerk in court, or his agent, two days previous to the hearing of the cause. When the cause is called on, and the exhibit required to be proved, the original order and the exhibit described therein, together with the witness to prove the same, must be produced to the registrar in court, who will administer the usual oath; the examination also of the witnesses, as to the execution, is performed by the registrar. . . . No documents but those mentioned or described in the order can be thus proved at the hearing; and as the order saves just exceptions, all objections which can be taken to the admissibility of the document as evidence may then be urged by the opposing party. The attendance of an unwilling witness to prove an exhibit at the hearing may be enforced by process of subpoena."¹ The old chancery court of New York held that papers and writings of every description might be proved *viva voce* at the hearing, and the witnesses cross-examined at the discretion and under the direction of the court, but that no paper could be proved as an exhibit at the hearing unless satisfactory reason was shown to the court why it was not regularly proved in

¹ 2 Daniell, 441-445.

the usual way before the examiner.¹ An equity rule provides that: "Upon due notice given as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing."² Under this rule the court would certainly have full power and discretion to permit the cross-examination of witnesses when called to prove exhibits *viva voce* at the hearing. In all cases where witnesses are examined orally before the court their testimony should be reduced to writing and made a part of the record, or it will be entirely disregarded on appeal.³

§ 462. The production of documents by defendant as evidence for plaintiff.— We have shown in the chapter on the original bill that, as a general rule, every plaintiff in equity is entitled to a discovery from the defendant, upon oath, of all the matters of fact which are well pleaded in the bill, and which are material to the proof of the plaintiff's case; that the plaintiff is entitled to such discovery from defendant either in aid of proof to be made by the examination of witnesses or to supply the want of such proof; that the discovery to which the plaintiff is entitled is not confined to a discovery of facts resting merely in the knowledge of defendant, but extends to a discovery of deeds, papers and writings of every description in his possession or power, the contents of which are material to the proof of the plaintiff's case. But, to entitle the plaintiff to a production of any documents in the possession or power of the defendant, there must be a concurrence of the following precedent conditions, viz.: (1) The plaintiff must allege in his bill that the defendant has in his possession or power documents relating to the matters mentioned in the bill which are relevant testimony to prove the plaintiff's allegations, or some of them; (2) the defendant must, in his answer, admit his possession of, or power over, the documents the production of which is sought; (3) the defendant must, in his answer, or in some schedule to it, describe the documents the production of which is sought; (4) the plaintiff must show from the answer

¹ *Consequa v. Fanning*, 2 Johns. Ch. 481.

² Equity Rule 67.

³ *Blease v. Garlington*, 92 U. S. 1-10.

of defendant that the documents are relevant testimony to prove the plaintiff's case.¹

When the above conditions exist, then, according to the English practice, the plaintiff served upon the defendant a notice of a motion for an order upon him to produce the documents within a time to be limited by the order; if, upon a hearing of the motion, the court found that the plaintiff was entitled to the production, an order was made directing the defendant to deposit the documents in the hands of his clerk in court, with liberty to the plaintiff to inspect them and take copies. The order also directed the defendant's clerk in court to produce such documents before the examiner that their execution might be proved, and also to produce them before the court upon the hearing of the cause that they might be used by the plaintiff as evidence to prove his case.² By the force of the United States equity rules this practice will be followed substantially in the federal courts.³

§ 463. Passing publication of the testimony.— According to the English practice the depositions of the witnesses were kept secret until the time for taking testimony had expired, and then publication was passed. In regard to the practice on this subject Mr. Daniell says: "Publication, in a legal sense, is the open showing of depositions, and giving copies of them to the parties, by the clerks or examiners in whose custody they are. By the orders of the court the depositions of witnesses are not to be disclosed by any of the persons before whom they were taken or by their clerks, but are to be closely kept, if taken in town, by the examiners at their office; if by commissioners in the country, by the sworn clerk to whom the commission, after its execution, was delivered, until publication passes. Publication passes either by consent or by rule. When both the plaintiff and defendant have examined such witnesses as they think proper, and are ready to go to a hearing, the clerks in court on both sides may pass publication by consent, which is done by signifying the same in one of the rule-books of the six clerks office, upon which publication immediately passes. A rule to pass publication is in the nature of an order of the court directing that publication shall pass unless cause

¹ *Ante*, § 118.

² Smith's Ch. Prac. 660-666.

³ Equity Rule 90.

is shown by the other side.”¹ When an application was made for an order of the court to pass publication, it was necessary to serve notice on the opposite side.²

In suits in equity in the circuit courts of the United States, the English practice in regard to passing publication is, in its substantial features, preserved and followed by the express provisions of the federal statutes and equity rules. When depositions are taken they are sealed up and transmitted to the clerk of the court and are kept sealed until opened in court.³ An equity rule provides that: “Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk’s office, publication thereof may be ordered in the clerk’s office by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties publication of the testimony may, at any time, pass in the clerk’s office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the depositions or testimony.”⁴

§ 464. Examination of witnesses *ad informandum conscientiam judicis*, obsolete.—During the reign of Elizabeth a strange practice prevailed, of examining witnesses to inform *the conscience of the judge only*; such examination was allowed when the proofs regularly taken left some important issue in doubt, and the examination was had to clear such doubts and to inform the conscience of the court. Sometimes the court directed a witness to attend personally in court for oral examination, and at other times a commission issued to take the depositions of witnesses, and the depositions taken for this special purpose were delivered to the judge, sealed up. In some cases these depositions were taken by consent of both parties. These

¹ 2 Daniell, 562, 563.

² 2 Daniell, 565, 566.

³ U. S. R. S., sec. 865; Equity Rules, 67, 69.

⁴ Equity Rule 69.

depositions were not sent to the master when the case was referred, nor to the judges when an issue or an action at law was directed to be tried, unless by consent. This practice continued to the time of Lord Bacon, who regulated it by order; but it has long been obsolete.¹

(d) JUDICIAL NOTICE.

§ 465. **Judicial notice — General rule.**— “Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction; and, if the judge’s memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper.”² Courts will take judicial notice of matters of common knowledge and of things in common use by the people.³ “Some classes of facts are dependent more peculiarly upon the memory than upon the information of the judge; and when he is at fault (which must needs frequently happen, for they are often beyond the ordinary power of memory), documents of reference are brought to his assistance. This is the case with respect to dates; for which the court will require no other proof than applying to an almanac. General history, the acts of our government, and the laws of the land, fall under this description. . . . A perfect knowledge of the laws of the land, and the practice of the court, is an essential part of the judicial character. But as this is the language of theory, and the judge, in reality, often requires to be informed, or at least to have his memory refreshed, it frequently becomes necessary to prove to him particular points of law. The means of proof consists of acts of parliament, and precedents, decisions of similar cases, and, for matters of practice, sometimes the statements of the officers.”⁴

§ 466. **Federal courts take judicial notice of the federal constitution and laws.**— All of the courts of the United States

¹ Spence, 380, 381; Gresley’s Eq. Ev. 496; Order Jan. 29, 1618-1619; Bacon, Ch. No. 74 (Sand. Ord. 119). This order provided that: “No witness shall be examined after publication, except it be by consent or by special order *ad informandum conscientiam judicis*, and then to be

brought close sealed up to the court, to peruse or publish as the court shall think good.”

² Brown v. Piper, 91 U. S. 42.

³ King v. Gallun, 109 U. S. 99; Terhune v. Phillips, 99 U. S. 592.

⁴ Gresley’s Eq. Ev. 397, 401.

take judicial notice of the constitution and laws of the United States.¹

§ 467. Same — Corporations created by federal law.— The courts of the United States take judicial notice of the fact that a railroad company has been incorporated by an act of the congress of the United States.²

§ 468. Same — Treaties made by the United States.— A treaty made under the authority of the United States is a law of the land, as much so as an act of congress, whenever its provisions prescribe a rule by which the rights of a citizen may be determined; and all courts, both state and federal, will take judicial notice of such treaty, and resort to it for a rule of decision, in cases before them, when the rights secured by it are of a nature to be enforced in a court of justice.³

§ 469. Same — Establishment of territorial governments. The courts of the United States take judicial notice of an act of congress creating and providing a temporary government for a territory of the United States, and of the powers conferred by the act upon the territorial government.⁴

§ 470. Federal courts take judicial notice of state laws.— It is a settled rule that the circuit courts of the United States, and the supreme court of the United States upon appeal or writ of error from the circuit courts, take judicial notice of the public laws and jurisprudence of every state in the Union.⁵

§ 471. Same — United States supreme court on writ of error to state courts.— On a writ of error to the highest court of a state, the supreme court of the United States does not take judicial notice of the laws of another state.⁶ In one of the

¹ *Marbury v. Madison*, 1 Cranch, 137; *Furman v. Nichol*, 8 Wall. 44.

² *Texas & P. R. Co. v. Cody*, 166 U. S. 606.

³ *United States v. Rauscher*, 119 U. S. 407.

⁴ *Brown v. Colorado*, 106 U. S. 95; *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65.

⁵ *New York Fourth National Bank v. Francklyn*, 120 U. S. 747; *Gormly*

v. Bunyan, 138 U. S. 623; *Lamar v. Micou*, 114 U. S. 218; *Elwood v. Flannigan*, 104 U. S. 562; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226; *Cheever v. Wilson*, 9 Wall. 108; *Pennington v. Gibson*, 16 How. 65; *Owings v. Hull*, 9 Pet. 607.

⁶ *Hanley v. Donoghue*, 116 U. S. 1, 7; *Lloyd v. Matthews*, 155 U. S. 227; *Railroad Co. v. Ferry Co.*, 119 U. S. 615.

cases cited, which was a writ of error to the court of appeals of the state of Maryland, the supreme court of the United States, discussing the rule upon this subject, said:

“Congress, in the execution of the power conferred upon it by the constitution, having prescribed the mode of attestation of records of the courts of one state to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. But congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

“Upon principle, therefore, and according to the great preponderance of authority (as shown by the cases collected in the margin), whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other fact. . . .

“When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States.

“But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

“In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof.

“But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determin-

ing whether a question of law depending upon the constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it — while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error, — yet, as in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them unless made a part of the record sent up. The case comes in principle within the rule laid down long ago by Chief Justice Marshall: ‘that the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statements made in the record of the court below, cannot be questioned.’”¹

The supreme court of the United States, upon a writ of error to the highest court of a state, does, however, take judicial notice of the law of another state, when by the local law that court takes judicial notice of it.²

§ 472. Courts of the United States take judicial notice of state constitutional conventions.— The lower courts of the United States, and the supreme court on appeal from their decisions, take judicial notice of the days of public general elections of members of the state legislatures, and of the election of delegates to and the assembling of state constitutional conventions to revise the fundamental law of the state, and the times of the commencement of the sitting of such bodies, and of the dates when their acts take effect.³

§ 473. Federal courts take judicial notice of charters granted by a state, when.— When, by the act of the legislature of a state, a corporation is created and chartered, and the act of incorporation or any general law of the state declares that such act of incorporation shall be considered a public law, the courts of the United States will take judicial notice of the act of incorporation, without its being specially pleaded or proved.⁴

¹ *Hanley v. Donoghue*, 116 U. S. 1, 7. *Junction R. Co. v. Bank of Ashland*,

² *Renaud v. Abbott*, 116 U. S. 277. 12 Wall. 226; *Case v. Kelly*, 133 U. S.

³ *Mills v. Green*, 159 U. S. 651. 21.

⁴ *Beatty v. Knowler*, 4 Pet. 152;

§ 474. **Federal courts take judicial notice of the laws of an antecedent government.**—When the United States acquires territory from a foreign government, the laws which were in force in such territory up to the time of its acquisition by our government, and under which titles are claimed, are not regarded by the courts of this country as foreign laws, but as the laws of an antecedent government, and the courts of the United States will take judicial notice of such laws.¹ Chief Justice Taney, stating the rule upon this subject, said: “The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that state depend, must be judicially noticed and expounded by the court like the laws affecting titles to real property in any other state. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana. And it can never be maintained in the courts of the United States that the laws of any state of this Union are to be treated as the laws of a foreign nation, and ascertained and determined as a matter of fact by a jury upon the testimony of witnesses. And if the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that state would become unstable and insecure, and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses and the fluctuating verdicts of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend.”² And in a case appealed from the United States district court from California, involving title to land claimed under Spanish laws, the same learned judge said: “It is proper to remark that the laws of these territories under which titles were claimed were never treated by the courts as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them,—as much so as the laws of a state of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official cus-

¹United States v. Perot, 98 U. S. 168 U. S. 208; United States v. Chaves, 428; United States v. Turner, 11 How. 159 U. S. 452.

663; Fremont v. United States, 17 ²United States v. Turner, 11 How. How. 542; Crespin v. United States, 663.

toms and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts and the practice of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any source. It exercises the same discretion and power in this respect which it exercises when it refers to the different reported decisions of state courts, and compares them together in order to make up an opinion as to the unwritten law of the state or the construction given to one of its statutes."¹ The doctrine of these decisions has lately been reaffirmed by the supreme court.² In a case in which four leagues of land were claimed, as granted by the commandant of the post of Nacogdoches, under the Spanish government, in the province of Texas, the supreme court used this language: "The leagues intended were Spanish leagues, such as were used in land measures and grants in Mexico and Texas at that period. Now we are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, in force in Texas previous to the Texan revolution, were the laws not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws, and we take judicial notice of them."³

§ 475. The courts of the United States will not take judicial notice of foreign laws.—Foreign laws and usages are matters of fact and not matters of law, and will not be judi-

¹ *Fremont v. United States*, 17 How. 452; *Crespin v. United States*, 168 U. S. 208.

² *United States v. Chaves*, 159 U. S. ³ *United States v. Perot*, 98 U. S. 428.

cially noticed. "A party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof." "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained at law and in equity in England and America."¹

§ 476. Judicial notice of seals of notaries public.— Courts "will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world;" and a certificate of protest made by a notary public, authenticated by his seal, is entitled to full faith and credit, and such certificate, attached to a foreign bill of exchange, when put in evidence, is sufficient proof of the presentment and non-payment of the bill. The notarial certificate of protest, when authenticated by the notarial seal, is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence. It has long been adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants; and being founded in public convenience, they ought, everywhere, to be allowed as evidence of the facts which they purport to state.²

§ 477. Courts of one state do not take judicial notice of the laws of another state.— No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be pleaded and proved before they can be acted upon, or any rights claimed under them.³ But it is within the legislative

¹ *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 445; *Pierce v. Indseth*, 106 U. S. 548; *Dainese v. Hale*, 91 U. S. 13; *Talbot v. Seeman*, 1 Cranch, 1, 38; *Church v. Hubbard*, 2 Cranch, 187; *Strother v. Lucas*, 6 Pet. 763; *Armstrong v. Lear*, 8 Pet. 52; *United States v. Wiggins*, 14 Pet. 334; *Ennis v. Holmead*, 14 How. 400.

² *Pierce v. Indseth*, 106 U. S. 546; *Townsley v. Sumrall*, 2 Pet. 170; *Chanoine v. Fowler*, 3 Wend. 173; *Halliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558.

³ *Chicago & Alton R. Co. v. Wig-*

power of a state to require its courts to take judicial notice of the laws of other states.¹

§ 478. Judicial notice of territorial extent of governmental jurisdiction.—“Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by” the supreme court of the United States, “and has been affirmed under a great variety of circumstances.”² And “all courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings.”³

§ 479. Judicial notice of rules of navigation.—The courts may take judicial notice of the rules of navigation established in the British orders in council on January 9, 1863, and in our act of congress of 1864, and which, before the close of the year 1864, had been accepted as obligatory as laws of the sea by more than thirty of the principal commercial states of the world. And the courts may also take judicial notice of the historical fact that, by the common consent of mankind, the above mentioned laws of the sea have been recognized and acquiesced in as of general obligation.

gins Ferry Co., 119 U. S. 622; *Hanley v. Donoghue*, 116 U. S. 1, 8; *Lloyd v. Matthews*, 155 U. S. 226, 227.

¹ *Hanley v. Donoghue*, 116 U. S. 1, 8; *Hobbs v. M. & C. R. Co.*, 9 Heisk. 873.

² *Jones v. United States*, 137 U. S. 202, 212; *Gelston v. Hoyt*, 3 Wheat. 246, 324; *United States v. Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Keane v. McDonough*, 8 Pet. 308; *Garcia v. Lee*, 12 Pet. 511,

520; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; *United States v. Yorba*, 1 Wall. 412, 423; *United States v. Lynde*, 11 Wall. 632, 638.

³ *Jones v. United States*, 137 U. S. 202, 214; *United States v. Reynes*, 9 How. 127; *Kennett v. Chambers*, 14 How. 38; *Hoyt v. Russell*, 117 U. S. 401, 404; *Coffee v. Grover*, 123 U. S. 1; *State v. Dunwell*, 3 R. I. 127; *State v. Wagner*, 6 Me. 178.

⁴ *The Scotia*, 14 Wall. 170.

§ 480. Judicial notice of the proclamations of the president of the United States.—A proclamation of the president of the United States is a public act of which all the courts of the United States are bound to take judicial notice and to which all courts are bound to give effect;¹ and such proclamations are conclusively presumed to have had a valid existence on the day of their date.²

§ 481. Judicial notice of the rules and regulations of the executive departments of the federal government.—The rules and regulations prescribed by the Interior Department in respect to contests before the land office are matters of which the courts of the United States take judicial notice; “and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.”³

§ 482. Judicial notice of the persons who preside over the patent office.—The courts of the United States will take notice judicially of the persons who from time to time preside over the patent office of the United States, whether permanently or transiently, and the production of their commissions is not necessary to support their official acts.⁴

§ 483. Courts do not take notice of military orders.—There is no rule of law or practice requiring the courts of the United States, or any other court, to take judicial notice of the various orders issued by a military commander in the exercise of the authority conferred upon him.⁵

¹ *Armstrong v. United States*, 13 Wall. 154, 156; *The Three Friends*, 166 U. S. 1.

² *Lapeyre v. United States*, 17 Wall. 191.

³ *Caha v. United States*, 157 U. S. 211, 221, 222.

⁴ *New York & Maryland Line R. Co. v. Winans*, 17 How. 40, 41.

⁵ *Burke v. Miltenberger*, 19 Wall. 519.

§ 484. Judicial notice of the ordinary meaning of words.— Unless words have a special meaning, acquired by commercial usage or in some other way, they must receive their ordinary meaning, and of that meaning courts are bound to take judicial notice;¹ and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.²

§ 485. In taking judicial notice judges may refresh their memory and inform their conscience.— “In the ascertainment of any facts of which they are bound to take judicial notice, as in the decisions of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they may decree most trustworthy.”³

(e) PRESUMPTIONS.

§ 486. Classification of presumptions.— Presumptions are either (1) presumptions of fact, or (2) presumptions of law; and presumptions of law are either (1) disputable or rebuttable presumptions of law, or (2) conclusive or absolute presumptions of law.

§ 487. Presumptions of fact.— In legal procedure the presumption of a fact is the finding by the jury in actions at law, or by the chancellor in suits in equity, of the existence of some material fact in the case, drawn as a conclusion from the existence of some other fact or facts, the existence of which has been proved or admitted. In presuming the existence of a fact a jury acts upon legal evidence, by process of human reasoning, based upon the common knowledge and experience of mankind, guided by the natural relation of events and the rules of law which determine the relevancy of testimony in judicial controversies. Presumptions from evidence given in a cause of the existence of particular facts are, in many if not in all

¹ *Nix v. Hedden*, 149 U. S. 304; *U. S.* 37, 42; *State v. Wagner*, 61 Me. 175; *Gardner v. Collector*, 6 Wall. 175; *Toplitz v. Hedden*, 146 U. S. 252.

² *Nix v. Hedden*, 149 U. S. 304. 499; *South Ottawa v. Perkins*, 94

³ *Jones v. United States*, 137 U. S. U. S. 260-277; *Post v. Supervisors*, 202, 216; *Fremont v. United States*, 105 U. S. 667; *Ex parte Hitz*, 111 U. S. 17 How. 542, 557; *Brown v. Piper*, 91 766; *In re Baiz*, 135 U. S. 403.

cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court will exclude the testimony or set aside the verdict and award a new trial, as the case may require. When evidence is offered to establish the existence of a fact *presumptively*, the question as to its relevancy is, as in all other cases, a question of law to be determined by the court. The legal relation of the fact offered in evidence to the fact to be presumed from it, that is, the tendency of the one to establish the other, must necessarily arise, and when it does arise it must be determined by the court; and the court having passed upon the legal question of relevancy, the jury must pass upon the existence or non-existence of the fact sought to be established by presumption; and so it would seem that the presumption of the existence of a fact from evidence given in a cause is a mixed question of law and fact.¹ Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts; when the facts appear, presumptions disappear.² Presumptions of fact or presumptive evidence are often resorted to in cases involving the most important affairs and transactions of this life, to establish the existence of the main fact in litigation. "When the fact itself cannot be proved, that which comes nearest to proof of the fact is the proof of the circumstances that necessarily and usually attend such facts, called presumptions and not proofs, for they stand instead of proofs of the fact till the contrary be proved."³

§ 488. Same — Presumption as to the delivery of letters through the mail service.—The rule is well settled that if a letter properly directed is proved to have been either put in the postoffice or delivered to the postman, it is presumed, from the known course of business in the postoffice department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. The presumption so arising is not a conclusive presumption of law, but a mere pre-

¹Bank of United States v. Corcoran, 2 Pet. 121; Giles v. Baremore, 5 Johns. Ch. 545; Waterbury v. Sturtevant, 13 Wend. 353; Henderson v. Carbondale Coal & C. Co., 140 U. S. 25; Schutz v. Jordan, 141 U. S. 213.

²Lincoln v. French, 105 U. S. 614; Fresh v. Gilson, 16 Pet. 327.

³1 Gilbert's Ev. 142.

sumption of fact founded on the probability that the officers of the government will do their duty in the usual course of business, and, when it is opposed by evidence that the letter was never received, must be weighed with all the other circumstances of the case, in determining the question whether the letter was actually received or not.¹ But no such presumption arises unless it appears that the person addressed resides in the city or town to which the letter was addressed.² When a letter is duly mailed, a presumption arises that it is delivered; but that presumption is that it is delivered in the usual course of business; and when the usual course of business is for an agent of a party to receive his mail, the presumption is that the agent received it rather than the principal.³

§ 489. **Same — Domicile.**— “The place where a person lives is taken to be his domicile until facts adduced establish the contrary; and a domicile, when acquired, is presumed to continue until it is shown to have been changed.” Domicile is defined as “a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.” And “where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired the old one remains. These principles are axiomatic in the law upon the subject.”⁴ The domicile of the husband is the domicile of the wife; and this is true although the wife may be residing in another place and

¹ Schutz v. Jordan, 141 U. S. 213; Henderson v. Carbondale Coal & C. Co., 140 U. S. 25; Rosenthal v. Walker, 111 U. S. 185; Huntley v. Whittier, 105 Mass. 391.

² Henderson v. Carbondale Coal & C. Co., 140 U. S. 25.

³ Schutz v. Jordan, 141 U. S. 213.

⁴ Anderson v. Watt, 138 U. S. 694; Mitchell v. United States, 21 Wall. 350; Desmare v. United States, 93 U. S. 605.

living apart from her husband without sufficient cause. The rule is "founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognize the wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved or so modified as to establish separate interests."¹

§ 490. Disputable presumptions of law.—In a great variety of cases, the law, upon grounds of public policy and the fundamental maxims of jurisprudence, dispenses with complete proof and presumes the existence of a fact in issue, but does not forbid the introduction of evidence to overcome the presumption. In such cases the presumption is disputable, and holds good till overcome by proof. "By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts of even the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*. Thus, it will be presumed that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared, at-

¹ Anderson v. Watt, 138 U. S. 694; Story's Confl. Laws, sec. 46; Whar-Cheely v. Clayton, 110 U. S. 701; ton, Confl. Laws, sec. 43. Harteau v. Harteau, 14 Pick. 181, 185;

tornment will be intended, and that deeds and grants have been accepted which are manifestly for the benefit of the party.”¹

§ 491. Same — Presumption that public officers have done their duty.—“The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. ‘The true principle to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.’ Nowhere is the presumption held to be a substitute for proof of an independent and material fact.”²

§ 492. Same—Regularity of judicial proceedings.—“There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears; and this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.”³

§ 493. Same — That state courts will do what federal constitution and laws require.—“The presumption in all cases is that the courts of the states will do what the constitution and

¹ United States Bank v. Dandridge, 12 Wheat. 64, 69.

² United States v. Ross, 92 U. S. 281, 284; United States v. Carr, 132 U. S. 644, 653.

³ Voorhees v. Bank of United States, 10 Pet. 449; Williams v. United States, 1 How. 290; Nations v. Johnson, 24 How. 195; Harvey v. Tyler, 2 Wall. 328; Baltimore & P. R. R. Co. v. Sixth

Presb. Church, 91 U. S. 127; Applegate v. Lexington & Mining Co., 117 U. S. 255; Grignon v. Astor, 2 How. 319; Kemp v. Kennedy, 5 Cranch, 173; Thompson v. Tolmie, 2 Pet. 157; Florentine v. Barton, 2 Wall. 210; McGoon v. Scales, 9 Wall. 319; White v. Crow, 110 U. S. 183; Cornett v. Williams, 87 U. S. 226; McNitt v. Turner, 16 Wall. 352, 365, 366.

laws of the United States require, and removals cannot be effected to the courts of the United States because of a fear that they will not.”¹

§ 494. Same — Presumptions in favor of patents issued for public lands.— When the officers of the government charged with the alienation of the public lands issue a patent, the presumption is that it was issued upon sufficient evidence that the law had been complied with by the officers of the government, and that all the preceding steps required by law had been observed before it was issued; and an effort to correct or annul a patent on the ground of fraud or mistake should be successful only when the allegations on which the attempt is made are clearly stated and fully sustained by proof.²

§ 495. Same — Persons acting in a public office.— The law presumes that persons acting in a public office have been duly appointed, and are acting within authority, until the contrary is shown. The settled rule is that “the public acts of public officers, purporting to be exercised in an official capacity, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles.”³

§ 496. Same — Presumption of death from seven years’ absence.— In regard to this subject the supreme court of the United States has said: “The general rule undoubtedly is, that ‘a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.’ But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death

¹Chicago & A. R. R. Co. v. Wiggins Ferry Co., 108 U. S. 18; Shreveport v. Cole, 129 U. S. 36.

²United States v. Iron Silver Mining Co., 128 U. S. 673; Maxwell Land

Grant Case, 121 U. S. 325; Colorado Coal & Iron Co. v. United States, 123 U. S. 307; Polk v. Wendal, 9 Cranch, 87; Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Pet. 448; Minter v. Crommelin, 18 How. 87.

³United States v. Peralta, 19 How. 343, 347; Keely v. Sanders, 99 U. S. 441.

in fact occurred within the seven years. If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy his life, the court or jury may infer that life ceased before the expiration of the seven years. 'Although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life.' These views are in harmony with the settled law of the English courts. In the leading case in the court of exchequer of *Nepeau v. Doe dem. Knight*, in error from the court of king's bench, Lord Denman, C. J., said: 'We adopt the doctrine of the court of king's bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.' To the same effect are Mr. Greenleaf and the preponderance of authority in this country."¹ And the rule as stated was followed by the court.

§ 497. Same — Persons presumed to intend necessary consequences of act.— "Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, as they are supposed to know what the consequences of their acts will be in such transactions. Experience has shown the rule to be a sound one, and a safe one to be applied in criminal as well as civil cases. Exceptions to it undoubtedly may arise, as when the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence flowing from it is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent."²

§ 498. Same — Presumption of legitimacy — Testamentary recognition of child — Civil-law rule.— Access between

¹ *Davie v. Briggs*, 97 U. S. 628. ² *Clarion Bank v. Jones*, 21 Wall. 325, 337, 338.

husband and wife will always be presumed until the contrary is clearly established by satisfactory evidence, and nothing will be allowed to repel the legal presumption of the legitimacy of the child but proof of facts showing that it was either physically or naturally impossible for the husband to have been the father of the child.¹ "The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration." This is the rule of the civil law, announced in the one hundred and seventeenth "Nouvelle of Justinian," which is as follows: "We have determined to ordain that if any one having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three credible witnesses, or in his last will, or in public acts, that this son or this daughter is his child, and that he does not call them natural children, they shall be reputed legitimate, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children."²

§ 499. Same — Presumption of the date and delivery of deeds.— The possession of a deed by the grantee is *prima facie* evidence of its delivery. Under ordinary circumstances no other evidence of the delivery of a deed than the possession of it by the person claiming under it is required. Delivery will be presumed from the possession.³ While it is law that a delivery of a deed is essential to pass an estate, and there can be no delivery without a surrender of the instrument or the right to retain it, such delivery will be presumed, in the absence of direct evidence, from the concurrent acts of the parties recognizing a transfer of the title.⁴ The delivery of a deed or mortgage is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.⁵

¹ *Gaines v. Hennen*, 24 How. 553; *Cross v. Cross*, 3 Paige, Ch. 139; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375.

² *Gaines v. Hennen*, 24 How. 553, 600, 601, 602.

³ *Gaines v. Dunn*, 14 Pet. 322; *Hanrick v. Neely*, 10 Wall. 364.

⁴ *Gould v. Day*, 94 U. S. 405.

⁵ *United States v. Le Baron*, 19 How. 73; *Fowler v. Morrill*, 11 How. 375.

§ 500. Same — Presumption of grant from long-continued possession.—The long-continued and uninterrupted possession, use and enjoyment of real property, under claim of title, accompanied by the payment of taxes, create a presumption of a grant; the presumption is not founded on the belief that a grant was actually made, but it will be sufficient that the evidence shows that a grant might possibly have been made.¹ In one of the cases cited, Mr. Justice Field, delivering the unanimous opinion of the supreme court of the United States, said:

“The defendants requested the court to instruct the jury ‘that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor.’ This instruction the court refused to give, or to modify its charge in conformity with it. The defendants now contend that the court thus erred, its charge being in effect that, in order to presume a lost deed, the jury must be satisfied that such a deed had in fact actually existed. Such seems to us to be the purport of the charge, and therein there was error.

“In such cases, ‘presumptions,’ as said by Sir William Grant, ‘do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, merely for the purpose and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles must forever remain imperfect, and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested.’

“The owners of property, especially if it be valuable and

¹Fletcher v. Fuller, 120 U. S. 534, 545, 548; Hillary v. Waller, 12 Ves. 239, 252; Eldridge v. Knott, Cowp. 215; Casey’s Lessees v. Inloes, 1 Gill, 430, 503; s. c., 39 Am. Dec. 658; Williams v. Donell, 2 Head (Tenn.), 695; Edson v. Munsell, 10 Allen, 557, 568; Ricard v. Williams, 7 Wheat. 59, 110; Union Savings Bank v. Taber, 13 R. I. 683; United States v. Dickson, 15 Pet. 141; Ewing v. Burnett, 11 Pet. 41; McClung v. Ross, 5 Wheat. 116; Elwell v. Hinckley, 138 Mass. 225; Glasscock v. Hughes, 55 Tex. 461; Coolidge v. Learned, 8 Pick. 504; Beckford v. Wade, 17 Ves. 87; Davis v. Easley, 13 Ill. 192; St. Louis Public Schools v. Risley’s Heirs, 40 Mo. 356, 370; Durant v. Ritchie, 4 Mason, 45; United States v. Chaves, 159 U. S. 452.

available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally or upon a contract of sale with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements and a conviction that they can be readily obtained at any time. The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or, if found, time may have so impaired their recollection of the transaction that they can only be imperfectly recalled, and of course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in, and by reasonable presumptions that acts to protect one's rights, which might have been done, and in the ordinary course of things generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions, and thus gives peace and quiet to long and uninterrupted possessions.

“The rule of presumption, in such cases, as has been well said, is one of policy as well as of convenience, and necessary for the peace and security of society. ‘Where one uses an easement whenever he sees fit, without asking leave and without objection,’ says the supreme court of Pennsylvania, ‘it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot afterward be disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.’ The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. As said by this court, speaking by Mr. Justice Story: ‘A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.’ It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution. In *Edson v. Munsell*, 10 Allen, 557, 568, which was an action for obstructing the enjoyment of an easement, the doctrine of acquiring such rights by prescription or adverse possession is elaborately considered; and it is there said that ‘the fiction of presuming a grant from twenty years’ possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute of 21 Jac. 1, ch. 21, for actions of ejectment. It is not founded on a belief that the grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possession.’ In *Casey’s Lessees v. Inloes*,

1 Gill, 430, 503 (*S. C.*, 39 Am. Dec. 658), which was an action of ejectment, the court of appeals of Maryland held that where there had been a continuous possession of land for twenty years or upwards by a party or person claiming under him, the court was authorized to instruct the jury, in the absence of a deed to such party, to presume that one had been executed to him. It also approved the refusal of the court below to instruct the jury that before they could find a title in the defendants, or any one of them, by presumption of a grant by plaintiff or those under whom he claims, they must believe on their consciences and find as a fact that such grant was actually made. 'The granting of such a prayer,' said the court, 'would have had a tendency to mislead the jury by inducing them to believe that the presumption of a grant could not be made unless the jury, in point of fact, believed in the execution of the grant; whereas, it is frequently the duty of the jury to find such presumption as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant.' In *Williams v. Donell*, 2 Head, 695, 697, which was also an action of ejectment, the supreme court of Tennessee, speaking on the same point, said: 'It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have issued. And this appearing, it may be assumed, in the absence of circumstances repelling such conclusion, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.'

"In accordance with the doctrine thus explicitly declared, there can be no doubt that the court below should have instructed the jury as requested."¹

¹ *Fletcher v. Fuller*, 120 U. S. 534, 555.

"It may be safely said that by the weight of authority, as well as by the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty

years, and that such rule will be applied as a *presumptio juris et de jure*, whenever, by possibility, a right may be acquired in any manner known to the law." *Shiras*, Justice, in *United States v. Chaves*, 159 U. S. 464, citing 1 *Greenleaf*, Ev. (12th ed.), sec. 17; *Ricard v. Williams*, 7 Wheat. 59, 109; *Coolidge v. Learned*, 8 Pick. 503.

§ 501. Same — Possession by husband of wife's property creates no presumption of a gift.— In a jurisdiction which by legislation secures to married women their separate property free from the common-law marital rights of the husband, whenever a husband acquires possession of the separate property of his wife he must be deemed to hold it in trust for her benefit, in the absence of any direct proof that she intended to make a gift of it to him. Possession by the husband of the wife's separate estate does not, under such circumstances, create any presumption that the title to the property has passed to him.¹

§ 502. *Fraus est odiosa et non præsumenda* — Meaning of the maxim — Fraud established by circumstantial evidence. This maxim is an incomplete statement of the legal principle which it is intended to express; and it has therefore given rise to some confusion and contrariety of judicial opinion on the subject. It is not meant that fraud will not be presumed as a fact, drawn as an inference or conclusion from other facts proved, and which are evidence of the ultimate fact of fraud; it is only meant that fraud will not be presumed as matter of law without proof. The maxim expresses a mere fragment of the general maxim of the common law, namely, that the law presumes every person innocent of crime, dishonesty and moral turpitude until his guilt is established by proof. There are a number of legal maxims expressing with more or less completeness this principle of the common law. 1. *Injuria non præsumitur*. (A wrong is not presumed.) 2. *Odiosa et inhonesta non sunt in lege præsumenda*. (Odious and dishonest acts are not presumed in law.) 3. *Odiosa non præsumentur*. (Odious things are not presumed.) 4. *Fraus est odiosa et non præsumenda*. (Fraud is odious and not to be presumed.) The maxim declares simply a branch of the general presumption of innocence. The rule announced by the supreme court of the United States is: "Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law; and in both the rule is that he who makes the charge must prove it."²

¹Stickney v. Stickney, 131 U. S. 227; Garner v. Providence Second Nat. Bank, 151 U. S. 420.

²Hager v. Thompson, 1 Black (66 U. S.), 80; Clark v. Hackett, 1 Black (66 U. S.), 77; Collins v. Thompson, 22

But to establish fraud it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced.¹ Fraud ought not to be presumed, but must be proved. But the evidence of it is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony.² Suits "where fraud is of the essence of the charge necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth. Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."³ Where fraud is alleged the facts sustaining it must be clearly made out.⁴ Fraud is not presumed, either as matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.⁵ Fraud must be proved, but it is not necessary that it should be established by direct proof; resort may be had to circumstantial or presumptive evidence.⁶

§ 503. Presumption of the satisfaction and ademption of legacies.—An English author has stated the rule on this sub-

How. 246; Connor v. Featherston, 12 Wheat. 199; Gaines v. Nichols, 9 How. 356.

³ Castle v. Bullard, 23 How. 172, 187.

⁴ Farrar v. Churchill, 135 U. S. 609, 615.

¹ Rea v. Missouri, 17 Wall. 532; Castle v. Bullard, 23 How. 172.

⁵ Tucker v. Moreland, 10 Pet. 58, 78.

⁶ Waterbury v. Sturtevant, 13 Wend. 353.

² Kempner v. Churchill, 8 Wall. 362.

ject as follows: "It frequently happens that after a parent or a person standing *in loco parentis* has made a provision for a child by his will, the marriage of the child, or an opportunity for his advancement in life, causes the parent to make a provision for the same child during his life; or the converse may take place: the parent, on the marriage of the child, or on some other occasion, may engage to make a certain provision for his child, and afterwards by his will give to the child a legacy or provision without reference to his previous engagement; thus in each case making, in terms, a double provision for the same child. The court of chancery, in legal phrase, leans strongly against double portions, so that generally the second provision in the former case is treated as an ademption of the first, in the second as a satisfaction, unless an intention to the contrary is shown. . . . The doctrine of the court of chancery on this subject was expounded by Lord Thurlow, after Lord Hardwicke and others of his predecessors, who were desirous of founding the doctrine on reasonable principles independently of mere authority, as follows: As regards an advancement following a gift by will, a legacy by a father, or person standing *in loco parentis* to a child, is considered as a portion; it therefore carries with it these qualities, that it is a deliberate distribution among his children of such portions as he thinks fit: crediting him for the deliberation, if he advances in his life that sum which he had adjudged to be the due and proper portion of that child, the presumption of law is, that he has satisfied that intent, and consequently that it is no longer a ground for any further demand; and the law intends that every testator knows that such is the law. The same presumption arises upon a gift by will subsequent to a provision by settlement."¹

§ 504. Presumptions arising from the suppression of testimony.—*Omnia præsumuntur contra spoliatorem.*² "All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of

¹ 2 Spence, 427, 428, citing Barret v. Beckford, 1 Ves. 520; Ellison v. Cookson, 1 Ves. Jr. 107, 110; Shudal v. Jekyll, 2 Atk. 577; Watson v. Lord Lincoln, Ambl. 326; Graves v.

Boyle, 1 Atk. 509; Cuthbert v. Peacock, 2 Vern. 593; Powell v. Cleaver, 2 Bro. 516; Clark v. Sewell, 3 Atk. 97; Eastwood v. Vinck, 2 P. Wms. 616.
² Broom, Max. 938.

the other side to have contradicted;" and "the conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."¹

§ 505. Conclusive presumptions of law.—Conclusive presumptions are rules of law, which, in certain cases and under certain circumstances, determine the quantity and character of evidence required to establish a fact or facts, and forbid further inquiry.² The rule has been stated and illustrated by the supreme court of the United States as follows: "Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under a license granted by courts to executors, administrators, guardians and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise, great uncertainty of titles and other public mischiefs would ensue."³ It is a conclusive presumption "that a child born of a woman whose husband was living with her at the proper period and had no physical incapacity is his legitimate offspring."⁴ A proclamation of the president of the United States is conclusively presumed to have had a valid existence on the day of its date; and no inquiry is permitted upon the subject.⁵

¹ Kirby v. Tallmadge, 160 U. S. 379, 383; Blatch v. Archer, Cowper, 63, 65; McDonough v. O'Neil, 113 Mass. 92; Commonwealth v. Webster, 5 Cush. 295, 316; 1 Starkie, Ev., p. 54.

Improvement Co. v. Munson, 14 Wall. 442, 449.

³ Improvement Co. v. Munson, 14 Wall. 442, 449.

⁴ Gresley's Eq. Ev. 365.

² Gresley's Eq. Ev. 363, 364, 365; ⁵ Lapeyre v. United States, 17 Wall. 191.

(f) ADMISSIONS.

§ 506. **Classification of admissions.**—Admissions are either (1) admissions upon the record, or (2) admissions by stipulation or agreement of the parties; and admissions upon the record are either (1) actual admissions, or (2) constructive admissions, resulting from the form of the pleadings adopted by the parties in the case.

§ 507. **Actual admissions upon the record.**—Actual admissions upon the record appear either (1) in plaintiff's bill, or (2) in defendant's answer. In equity, any allegation of plaintiff's bill may be read in evidence by the defendant;¹ and the admissions of the defendant contained in his answer are conclusive upon him, and estop him from introducing conflicting testimony, and the fact admitted is no longer an issue in the case.²

§ 508. **Constructive admissions upon the record.**—When a defendant files a plea in bar of the whole bill, or any substantive part of it, he thereby admits the truth of every averment in the bill, or the part of it to which the plea is interposed, which is not denied by the plea; and this constructive admission is, for all purposes of the suit, absolutely conclusive upon the defendant.³ “The facts alleged in a bill, where they are alleged positively, and not by way of pretense, are also constructive admissions, in favor of the defendant, of the facts so alleged, and therefore need not be proved by other evidence; for, whether they be true or not, the plaintiff, by introducing them into his bill and making them part of the record, precludes himself from afterwards disputing their truth. Sometimes facts are hypothetically introduced into a bill for the purpose of raising an answer to an anticipated defense, with a species of protest against their being considered as admitted; as, ‘whereas your orator charges that, in case such or such a thing be true, but which your orator by no means admits;’ in such case the matter alleged is not, of course, to be considered as admitted by the bill, but must be the subject of proof.”⁴

¹ *Ives v. Medcalf*, 1 Atk. 63.

³ *Ante*, § 301, and authorities cited.

² *Ante*, § 325, and authorities there cited.

⁴ 2 Daniell, 396, 397.

§ 509. Admissions by stipulation.—It is competent for the parties, being *sui juris*, to admit, by stipulation, any fact or facts which they may agree upon. This is usually done to save expense, “or for the sake of respectively purchasing advantages by concession.” But “if one party alone chooses to make an admission or waiver, as is often the case in an amicable suit, no sort of reciprocity is necessary to render it valid; satisfactory proof that the admission was made is all that will be required. The signature of the solicitor is quite sufficient.” It is not necessary that the admission be made in writing, but parol evidence of the fact that the admission was made will be sufficient. But no admission by or on behalf of an infant defendant will be received by the court.¹

(g) SOME GENERAL RULES OF EVIDENCE.

§ 510. Parol evidence inadmissible both at law and in equity to vary agreements in writing — Rule stated by United States supreme court.—It is a general rule that an agreement in writing, or an instrument carrying into execution an agreement, shall not be varied by parol testimony stating conversations or circumstances anterior to the written instrument. The rule is recognized in courts of equity as well as in courts of law; but courts of equity grant relief in cases of fraud and mistake which cannot be obtained in courts of law. In such cases a court of equity may carry the intention of the parties into execution where the written agreement fails to express that intention. In general, the mistakes against which a court of equity relieves are mistakes in fact.² It is well settled, as a rule of evidence, in courts of equity as well as in courts of law, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. And this rule is founded on the soundest principles of reason and policy as well as on authority.³ When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.⁴ It

¹ Gresley's Eq. Ev. 38-42; 2 Daniell, 395-407.

³ Sprigg v. Bank of Mount Pleasant, 14 Pet. 201, 206.

² Hunt v. Rousmanier, 8 Wheat. 174, 211, 212.

⁴ Willard v. Tayloe, 8 Wall. 557, 573.

is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note cannot be permitted to vary, qualify or contradict, or add to or subtract from, the absolute terms of the written contract.¹ No principle of evidence is better settled at common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident or mistake, conclusively presumed that the whole agreement, and the extent and manner of their undertaking, were reduced to writing.² It can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications properly arising in the absence of any positive expression of intention, to control, vary or contradict the most formal and deliberate declarations of the parties. The principle is that, while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms.³ Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proved by parol if, under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final settlement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal

¹ Forsythe v. Kimball, 91 U. S. 291, ³ De Witt v. Berry, 134 U. S. 306, 294; Specht v. Howard, 16 Wall. 564. 312; The Reeside, 2 Sumner, 567.

² Bast v. Bank, 101 U. S. 93, 96.

obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.¹ And where a written contract for the sale of a machine was in all respects unambiguous and definite, and contained no guaranty that the machine purchased should have a certain capacity, and there was no pretense of any fraud, accident or mistake in making the contract, parol evidence was held inadmissible to prove that there was a parol contract of warranty or guaranty collateral to the contract of purchase and sale, stipulating that the machine purchased should have a certain capacity.²

§ 511. Same.—Extrinsic evidence to identify property and persons.—Parol and extrinsic evidence is admissible to identify the property and persons embraced in a written instrument, and to which it is to be applied, and to prove their existence, location and character; such evidence does not vary or contradict the terms of the written instrument, but it simply identifies the property which is to pass under it.³

§ 512. Same — Patent ambiguities.—“It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of contracts, that the intention of the parties is to be inquired into; and, if not forbidden by law, is to be effectuated. But the law has laid down certain rules, declaring by what kind of proof, in any given case, this intention is to be ascertained. Amongst these rules, a leading one in relation to written contracts, to which class the one in question belongs, is this: That extrinsic evidence is not admissible to explain a patent ambiguity, that is, one apparent on the face of the instrument; but that it is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; for this is but to remove the ambiguity by the same kind of evi-

¹Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 517.

²Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 516, 517; Van Winkle v. Crowell, 146 U. S. 42.

³Brown v. Huger, 21 How. 305;

Blake v. Doherty, 5 Wheat. 359;

Deery v. Crary, 10 Wall. 263; Loner-

gan v. Buford, 148 U. S. 581; Irwin v.

San Francisco Sav. Union, 136 U. S.

578; Bailey v. Hannibal & St. J. R.

Co., 17 Wall. 96.

dence as that by which it is created. The rule thus stated seems to be in itself quite plain and intelligible, and yet much difficulty has arisen in its application. The illustration most usually given of the operation of this rule in the admission of extrinsic evidence is that of the description of a devisee, or of an estate, in a will, where it turns out that there are two persons, or two estates, of the same name and description. These, however, are put, not as measuring the extent of the rule, but as exemplifying its application; and all other cases within the scope of the principle are, in like manner, open to explanation by the same kind of evidence. Accordingly, it is laid down, by a very accurate writer on the subject of evidence, that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter.”¹

§ 513. Admissibility of extrinsic evidence in the interpretation of deeds and wills—English rule as stated by Mr. Spence.—“It is now proposed,” said Mr. Spence, “to take a general view of the rules which have been established for the admission of extrinsic evidence,—that is, of circumstances not forming part of the instrument itself in the interpretation of written instruments, more particularly in reference to deeds and wills.

“The general rule, as will have been collected from what has been already stated, is that a deed or other instrument, being produced and proved, is conclusive upon the rights of the parties. By a fundamental principle of law an obligation by deed can only be altered by deed; so it is a principle of the common law which prevailed before the statute of frauds, that parol evidence is not admissible to vary or add to a written instrument; to admit it as regards deeds would be, as Lord Bacon observed in the illustrations of his maxims, that parol evidence shall not be admitted to explain an *ambiguitas patens*, to allow that to pass by deed which the law appoints shall not pass but by deed; and in other cases it would be virtually to

¹ Barbour, Justice, in *Bradley v. Reed v. Proprietors of Locks & Steam Packet Co.*, 13 Pet. 89, 97. And *Canals*, 18 How. 274; *Atkinson v. Cummins*, 9 How. 479; *Patch v. White*, 117 U. S. 210.
328; *Wilkins v. Allen*, 18 How. 385;

give to oral a superior force to written evidence; to endeavor to subtract is the same in principle as to seek to add to a written instrument. With respect to instruments which are of a nature required by the statute of frauds to be in writing, the rule has the additional force of the statute. The rules of evidence are universally the same, as regards the point now under consideration, in the courts of law and of equity; therefore, parol evidence offered for the purpose of substantially altering a written instrument cannot be received in a court of equity any more than in a court of law. Lord Cowper intimated an opinion that the court, at least the court of chancery, in construing wills, might assist its judgment by parol evidence generally, in cases extremely dark and doubtful; but since the time of Lord Hardwicke this has been considered as exploded. One exception to the rule above mentioned, in both courts, is the date of the deed, which is never conclusive as to the time of the delivery, from which alone the deed takes its operation; for it is open to the party in all cases to show that the deed was executed or delivered on a day different from that whereon it appears to bear date. The rule is also subject to the following qualification, namely: When one consideration is recited in a deed, any other consideration which is not in contradiction of the instrument may be proved. . . . The general rule above mentioned excludes from the consideration of the court every question but this: What is the *meaning of the words* which the parties have used? The question is not broadly what was the *intention* of the parties; what the meaning of the words indicates must be taken to have been the intention.”¹

§ 514. Same—When the evidence will be admitted.—“Now, in reference to the admission of extrinsic evidence, with a view to ascertain the meaning of the words, it is to be observed that, in relation to the *subject* of every gift or transfer, and the person who is the *object* of the gift or transfer, the words used must be symbol of something extraneous to the instrument; we must, therefore, in *all cases* institute an inquiry beyond the instrument, in order to ascertain what or who in particular is meant by the words used. The words may have received a technical meaning, so as to be applicable, strictly or

¹1 Spence, 553, 554, 555, 556.

primarily, to a subject or person of a particular kind or character only, as is the case with the words 'message' and 'child;' still we must ascertain, by inquiring out of (that is, beyond) the instrument, what message is meant, and who is the individual who answers to the description of child. An inquiry of a similar nature, indeed, is sometimes resorted to, even to ascertain what is to be considered as the primary or legal import of the words used. Thus, on the hearing of a demurrer which raises a question as to what description of the thing is to be considered in law as intended by some particular expression, the judge may inform himself, from dictionaries or books relating to the particular subject, as to the meaning of the word. The judge may do the same at a trial before a jury; though if he show the books to the jury, they are not considered as evidence, but as the grounds on which he founds his opinion; just as when he cites authorities for any point of law which he lays down, in regard to the construction of the words of gift or of limitation in the instrument.

"As regards the *words of gift or limitation*, or those which point out the nature and extent of the interest intended to be conferred, here the words are not symbols of things; they are creative, not descriptive; generally speaking, therefore, it may be expected that they will not call for any explanation beyond what they themselves afford; but where the quantity of interest given or disposed of by a testator is in dispute, the words may here also bear different meanings under different circumstances; and the court at least, in some cases, may look out of the will, and be guided in the construction of it by the effect, if any, which the circumstances of the case may have upon it.

"It being, then, the object to ascertain the meaning of the words as used, the judge or jury can hardly be in a condition to do this, and to apply the words used to the proper subject and the proper object, and in the proper way, unless they can be placed, as it were, in the position of the parties who used the words. Accordingly it is the settled rule as regards a will, where the meaning of the terms is not positively fixed, that evidence may be given as to all the surrounding circumstances which influenced the mind of the person who executed the instrument; just as to understand the meaning of any writer we must first be apprised of the persons and circumstances

that are the subjects of his allusions and statements. Indeed, it is laid down that it is the duty of the court to make all proper inquiries for this purpose. For instance, where the state of the property will show in what sense a testator has used the words to be found in his will, resort may in some cases be had to evidence directed to that point. Thus, the state of the testator's funded property may be resorted to in order to show whether a bequest of stock is pecuniary or specific. So extrinsic evidence, such as contemporaneous exposition and ancient usage, is admissible for the purpose of construing the words of ancient charters. It may also be resorted to for explaining the meaning of the terms in contracts to which a peculiar and technical meaning has been annexed by custom and usage; also in some cases to ascertain a fact collateral to the written instrument, in order to explain the meaning where the instrument is equivocal, provided the evidence adduced in explanation be consistent with the written document; also to annex consequences and incidents to written contracts in mercantile transactions. It has also been admitted in contracts between landlord and tenant, and all other transactions of life in which known usages have been established and prevailed; for it is presumed that in such cases the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to then known usages. Even in the case of a statute, universal usage has sometimes been resorted to for the purpose of explaining doubtful terms. But when the terms of an ancient charter — and it must be the same with any other document — are not in themselves doubtful, either from the use of words which are equivocal or obscure or which are doubtful in point of legal construction, evidence of usage cannot avail. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain. Whether there is such a doubt is a question of law to be determined by the court of construction upon reading the instrument itself. . . . Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law and equity, in certain special cases, will admit extrinsic evidence of the in-

tention itself, in order to make certain the person or thing intended, where the description in the will is insufficient for the purpose; but it is now settled that the only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects or objects, that is, persons or things. . . . A latent ambiguity is created by parol, and it is reasonable that all the evidence applicable to the subject should be received; indeed, it may be considered as an universal rule that where evidence is admissible on one side it must be so on the other.”¹

§ 515. Same — Same — **Extrinsic evidence to repel presumptions of law relating to legacies.**— “There is one branch of this subject, namely, the admission of extrinsic evidence to repel presumptions of law, which is of such continual occurrence in the court of chancery, in questions relating to legacies and portions to children given by will, and in regard to trusts arising by operation of law, that it deserves particular attention. The law draws certain presumptions from particular facts, but these presumptions may be repelled; in fact, the court will not permit them to stand when they are at variance with the real intention as established by evidence; the cases as respects some branches of this subject are not exactly uniform. In considering this subject a distinction is to be observed between legal presumptions arising upon the words of the instrument as to its operative effect — that is, its construction,— and presumptions which arise upon collateral facts, independently of the operation of the instrument, *per se*, as ascertained by legal construction; it is, perhaps, to the latter kind of presumptions, and those of another kind, namely, those which are raised against the apparent meaning of the instrument, that extrinsic evidence, by our law, can, strictly speaking, alone be applied; what are to be considered as cases of *construction* in this sense, as distinguished from cases of *presumption*, as regards the interpretation of wills, is, as will be seen, involved in some obscurity. Where, said Lord Thurlow, the presumption of law arises from the construction of words simply *qua* words, no evidence can be admitted. The rule here adverted to is stated

¹ 1 Spence, 556-564.

by Lord Chancellor Sugden thus: 'If there be a *positive* rule of construction, you cannot receive evidence to raise a presumption against it, because that would be a violation of the true construction.' The following are instances of the application of the rule of construction in the sense here used: Where the same *specific thing* is given twice to the same legatee in the same will, or in the will and again in a codicil; and where two legacies of *quantity* of equal amount are bequeathed to the same legatee in one and the same instrument, in both cases the second bequest is construed to be a mere repetition of the legacy. On the other hand, when two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not considered to be merged in the other, but the latter will be construed to be cumulative, and the legatee is held to be entitled to both. Where two legacies are given *simpliciter* to the same legatee by different instruments, in that case also the latter is construed to be cumulative whether its amount be equal or unequal to the former, so that the legatee will take both; to hold otherwise, as it has been observed, would manifestly contradict the effect of the one or the other instrument; in the case of a stranger, particularly, there is not any ground for presuming beforehand that the testator did not mean that each instrument should have a separate operation. The *prima facie* in each of these cases is liable, according to the ordinary rules which apply to every case of construction, to be controlled by an intention to the contrary to be *collected from the instruments*, the whole of which and every part of them is to be looked to: the tendency of the modern decisions has been to construe wills in favor of cumulation. Where, as in the cases above adverted to, there is an acknowledged rule of construction applicable to the case, so that the intent in legal acceptance can be collected, parol evidence cannot be resorted to; in particular, where by construction it is held that the legacies are cumulative, parol evidence is not admissible against that construction, because that would be evidence against the instrument, and not against a presumption. If you construe a will there is nothing to presume, for the intention is secured, not by presumption, but by construction.

"Where, however, by presumption a conclusion is drawn *against the apparent* effect of an instrument, that presumption

may clearly be rebutted by parol evidence. The effect of the evidence in such cases is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, when the court raises the presumption against the intention of a double gift, by reason that the sums and the *motive* are the same in the two instruments, it will receive evidence to show that the testator actually meant the double gift that he has expressed. But where two legacies are so given that the court does not raise a presumption against their being double, parol evidence is inadmissible to show that the testator intended the legatee to take one only, for that would be in opposition to the will; the legatee does not take both by virtue of any presumption; for then parol evidence would be admissible, but directly under the words of the instrument. . . . The question frequently arises in cases depending upon acts partly testamentary and partly *inter vivos*, as of a legacy given, and then an advancement. As to these cases, evidence has been received to explain the *act of the advancement* and to show that it is to go in satisfaction of the legacy, and for that purpose it is clearly admissible; for it is only offered to show that the gift is satisfied. The law raises a presumption against double provisions in the nature of portions; thus if a parent or a person *in loco parentis* is, *simpliciter*, under an obligation to make a provision for a child, and afterwards make a provision of the same nature for the same child by his will — or when a provision is made, first by a will and then by a settlement, and the provisions are of the same nature, or with trifling differences only, — it is presumed *prima facie* that the settlor does not mean a double provision, but that the latter is to go in satisfaction of the former in the whole or *pro tanto*. But when the two provisions are of a different nature, the two instruments are considered to afford intrinsic evidence in favor of a double provision. Parol evidence is clearly admissible to rebut the general presumption against double portions; that is, to *support* the instrument.”¹

§ 516. Vice-Chancellor Wigram’s seven propositions regarding the construction of wills.—Vice-Chancellor, Sir James Wigram, in his work on Extrinsic Evidence, extracted from

¹ 1 Spence, 564–568.

the English cases at law and in equity seven propositions, relative to the construction of wills and the admissibility of extrinsic evidence in their interpretation. These propositions are as follows:

“Proposition I. A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

“Proposition II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular and secondary interpretation, and although the most conclusive evidence of intention to use them in such popular and secondary sense be tendered.

“Proposition III. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.

“Proposition IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words.

“Proposition V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may

inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

“The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator’s word.

“Proposition VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator’s meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Proposition VII) will be void for uncertainty.

“Proposition VII. Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator’s meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

“These cases may be thus defined: Where the object of a testator’s bounty or the subject of disposition (*i. e.*, the *person* or *thing* intended) is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator.”¹

§ 517. Extrinsic evidence admissible to correct fatal misdescription of real estate in a will.—A testator by his will devised lot number six, in square four hundred and three, with the improvements thereon, to his brother. It was held by the United States supreme court that extrinsic evidence was admissible to show that the testator did not own the lot described in the will, and that the lot had no improvements on it; but that the testator did own lot number three in square number

¹ Wigram’s Extrinsic Evidence.

four hundred and six, and that it did have improvements on it, and that it was the intention of the testator to devise the last named lot to his brother. In delivering the opinion of the court, Bradley, Justice, said:

“Now, the parol evidence discloses the fact that there was an evident misdescription of the lot intended to be devised. It is shown, first, as before stated, that the testator, at the time of making his will and at the time of his death, did not, and never did, own lot six in square four hundred and three, but did own lot three in square four hundred and six; secondly, that the former lot had no improvements on it at all, and was located on Ninth street, between I and K streets, whilst the latter, which he did own, was located on E street, between Eighth and Ninth streets, and had a dwelling-house on it, and was occupied by the testator’s tenants — a circumstance which precludes the idea that he could have overlooked it. It seems to us that the evidence, taken in connection with the whole tenor of the will, amounts to a demonstration as to which lot was in the testator’s mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator’s mind, whether lot three, square four hundred and six, which he owned, and which had improvements erected thereon, and corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot six, square four hundred and three, which he did not own, which had no improvements thereon, and which rendered the devise ineffective. . . . It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or secondly, it may arise when the will contains a misdescription of the objects or subjects: as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstantial or declarations of the

testator. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case, evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified: (1) By the context of the will; (2) to a certain extent by parol evidence. A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator. . . . Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstances, taken together. The error of the testator, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain. . . . In view of the principles advanced in these authorities, the case under consideration does not require any enlargement of the rule ordinarily laid down, namely, the rule which requires in the will itself sufficient to identify the subject of the gift, after striking out the false description."¹

§ 518. **The best evidence must be adduced.**—“The rule of law is, that the best evidence must be given of which the nature of the case is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not

¹Patch v. White, 117 U. S. 210.

permitted to give a copy in evidence, or to prove its contents.”¹ “One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more enlarged and general sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted which, from the nature of the case, supposes still greater evidence behind in the party’s possession or power; because the absence of the primary evidence raises a presumption that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party. This is the reason given for exacting, in all cases, the primary evidence, unless satisfactorily accounted for. For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary, technically, so as to compel the production of the higher, and the inferior is, therefore, admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially when it appears, or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled. . . . If the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.”¹

¹ *Tayloe v. Riggs*, 1 Pet. 591; *DeLane* 5 Cranch, 13; *McPhaul v. Lapsley*, 20 v. *Moore*, 14 How. 253; *Fresh v. Gil* Wall, 264.
son, 16 Pet. 327; *Cook v. Woodrow*, ² *Clifton v. United States*, 4 How. 242, 247, 248.

§ 519. Same—Written instruments.—It is a general rule of the law of evidence that secondary evidence of the contents of written instruments is not admissible when the originals are within the control or custody of the party.¹

§ 520. The evidence must be confined to the matters in issue.—It is a fundamental rule in equity procedure, as well as in trials at law, that the evidence must be confined to the matters in issue in the pleadings. The reasons of the rule are, that the plaintiff cannot obtain relief upon a case not made in his bill, but must aver every essential ultimate fact necessary to the relief sought, and the defendant cannot avail himself of any matter of defense which is not stated in his answer; and besides, each party is entitled to have notice from the pleadings of his adversary of the evidence which he intends to produce at the hearing. But the rule does not require either party to state his evidence upon the record; all that is necessary is, that the pleadings contain a statement of all the ultimate facts.²

§ 521. Same—Confessions and admissions.—Where a party to a suit in equity intends to prove that his adversary has made confessions and admissions, and he intends to use such confessions and admissions as evidence of facts at the hearing, it is necessary that the admissions and confessions be alleged in the pleadings, in order that the party against whom they are to be read may have an opportunity to meet them by evidence or explanation; the rule applies alike to both oral and written confessions and admissions, to letters and conversations. It is only when they are to be used as admissions that conversations and letters are required to be noticed in the pleadings.³

¹Sebree v. Dorr, 9 Wheat. 558; Sandys, 18 Ves. 302; Powys v. Mansfield, 6 Sim. 565; Smith v. Clark, 12 Dwyer v. Dunbar, 5 Wall. 318; Philadelphia & Trenton R. Co. v. Stimpson, 14 Pet. 448; Riggs v. Tayloe, 9 Ves. 477; Clark v. Periam, 3 Atk. 333, 9 Wheat. 483.

²Whaley v. Norton, 1 Vern. 483; 32 Daniell, 414, 415, citing Houlitch v. Marquis of Donegal, 1 Moll. 365; Blocker v. Phepoe, 1 Moll. 354; Gordon v. Gordon, 3 Swanst. 472; Clark v. Turton, 11 Ves. 240; Williams v. Llewellyn, 2 Y. & J. 68; Hall v. Maltby, 6 Price, 240; Montesquieu v. holland v. Hendrick, 1 Moll. 359.

CHAPTER XX.

INJUNCTIONS.

- § 522. Definition and classification of injunctions—Temporary and perpetual injunctions.
523. Same—Common and special injunctions.
524. Same—Prohibitory and mandatory injunctions.
525. Jurisdiction and power of the federal courts to grant injunctions.
526. Same—Federal courts may grant injunction where it may be granted by English chancery.
527. Writs of injunction granted by supreme court justices and circuit court judges.
528. Writs of injunction granted by district judges.
529. No injunction granted until after bill filed.
530. Same—Bill must contain special prayer for writ of injunction.
531. Bill for injunction must be verified.
532. No provisional special writ of injunction granted without notice.
533. Same—Temporary restraining order pending application for special injunction.
534. Same—Same—Application for special injunction—Procedure.
535. Injunction bond—Condition.
536. Motions to dissolve injunctions—Abatement.
537. Motion to dissolve the common injunction.
538. Motions to dissolve special injunction—The rule as stated by Justice Story.
- § 539. Assessment of damages on dissolution of injunction.
540. Injunctions to restrain proceedings at law.
541. Injunctions issued by federal courts to stay proceedings in state courts.
542. Injunctions to relieve against judgments—The rule stated by Chief Justice Marshall.
543. Injunctions issued by federal courts against judgments in state courts.
544. Injunction to restrain threatened defenses to a “proposed action at law.”
545. Restraining the prosecution of suits in foreign jurisdictions.
546. Injunction to restrain the collection of taxes.
547. Same—Overvaluation of property for taxation.
548. Same—Same—National bank stock.
549. Injunctions against unlawful restraint of trade and commerce.
550. Same—Not granted by federal courts to restrain monopoly in necessary of life.
551. Injunctions against unlawful restraint of the import trade.
552. Injunctions against violations of the acts to regulate interstate commerce.
553. Injunctions against infringement of common-law trademarks.
554. Injunctions against infringement of registered trademarks.

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| <p>§ 555. Injunctions against infringements of copyrights.</p> <p>556. Same—Dramatic and musical compositions—Procedure—Writ of injunction served anywhere in the United States.</p> <p>557. Restraint of copyright frauds.</p> <p>558. Injunctions against infringements of patents for inventions.</p> <p>559. Injunctions against executive state officers—No suit against a state maintainable.</p> <p>560. Same—Rules announced by the United States supreme court since the Eleventh Amendment.</p> <p>561. Same—Restraint of state railroad commissions.</p> | <p>§ 562. Injunctions to restrain waste and trespass.</p> <p>563. Injunctions to restrain nuisances, private and public.</p> <p>564. Same—Obstruction of interstate commerce.</p> <p>565. Summary of the ordinary objects of the writ of injunction.</p> <p>566. Injunctions in removal cases continued.</p> <p>567. No injunction against appointment or removal of public officers.</p> <p>568. No injunction to stay criminal proceedings.</p> <p>569. Breach of injunctions.</p> <p>570. Same—Contempt—Power to punish.</p> <p>571. Same—Procedure in contempt cases.</p> |
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§ 522. Definition and classification of injunctions—Temporary and perpetual injunctions.—A writ of injunction is a judicial writ, issued out of a court of equity, or a court possessing equity powers, in a suit therein pending, upon the verified bill of plaintiff showing special cause, and granted by the fiat or order of the court or a judge thereof, restraining the defendant from doing a particular act, or restraining him from refusing to do a particular act, in such writ mentioned and particularly specified, according to the exigency of the case made by the bill; it being averred in the bill that the doing, or the omission to do, the particular act is injurious to the rights of plaintiff.¹ The power to issue such writs is a part of that system of preventive justice and extraordinary jurisdiction inherent in all governments; this power was fully developed and administered in the Roman civil law, from which it was adopted in the High Court of Chancery of England;² and it has been vested in the courts of the United States by the federal constitution.³

“Injunctions are either provisional or perpetual. Provisional injunctions are such as are to continue until the coming in of

¹ 1 Smith's Ch. Prac. 585, 586; 3 Daniell, 274, 275; Redesdale (6th Am. ed.), 55, 56; *Moat v. Holbein*, 2 Edw. 188; *Sullivan v. Judah*, 4 Paige Ch. 444.

² 1 Spence, 321–339, 667–683.

³ U. S. Const., art. III, sec. 1.

the defendant's answer; or until the hearing of the case; or until the master has made his report: perpetual, are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience."¹ A perpetual injunction forms a distinct subject of relief. "The restraint may be imposed either by a final decree, forbidding the act *in perpetuum* on establishment of the adverse right, or by interlocutory writ, forbidding it *pro tempore* whilst the right is in litigation."² Injunctions are, therefore, either (1) perpetual, or (2) temporary. The writ issued pending the litigation is called a temporary, interlocutory, preliminary, or provisional writ of injunction. It is issued to prevent irreparable injury, or to preserve the right or subject-matter of the suit until the final hearing of the cause; or to restrain proceedings at law, or in some other court, until a hearing in equity, where the plaintiff has asserted an equitable claim, right or demand connected with or growing out of the controversy, and which cannot be asserted at law.³

§ 523. Same — Common and special injunctions.—In the English chancery practice provisional injunctions are either (1) common injunctions; or (2) special injunctions. The common injunction is one which restrains or stays proceedings at law; according to this practice, the plaintiff, having filed his bill and served a subpoena, is entitled, as of course, to the common injunction (1) upon the default of the defendant in not appearing; (2) upon the default of the defendant in not answering; (3) upon matter confessed by the defendant in his answer. But an injunction to stay proceedings at law might be obtained upon the special circumstances of the case, and it is then called a special injunction. "If the common injunction is obtained before a declaration is delivered it stays all the proceedings at law; if afterwards, it only restrains execution, and the plaintiff at law is at liberty to proceed to judgment." All injunctions, except the common injunction, are granted

¹ 3 Daniell, 275.

² Adam's Eq. 194.

³ Redesdale (6th Am. ed.), 55, 56;

¹ Smith's Ch. Prac. 585-626; 3 Daniell, 274-365.

upon the special circumstances of the case, whether such circumstances are disclosed by the answer of the defendant or upon affidavits, and are therefore called special injunctions.¹ The distinction between common and special injunctions is recognized in the courts of the United States by an equity rule which provides that: "Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant does not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered."² But in practice, in the circuit courts of the United States, the distinction between common and special injunctions is virtually obsolete, and injunctions to stay proceedings at law are usually granted upon the special circumstances of the case, and are special injunctions; still, however, the plaintiff is, under the equity rule quoted, entitled to the common injunction upon the default of the defendant.

§ 524. Same — Prohibitory and mandatory injunctions.—

Considered with reference to the nature and form of the relief, injunctions are (1) prohibitory or preventive; (2) mandatory. An injunction which is merely negative, restraining the defendant from doing some contemplated or threatened specific act, is preventive or prohibitory.³ But a court of equity is not always limited to the restraint of a contemplated or threatened action, but may require affirmative action where the circumstances of the case demand it; such injunction is mandatory, and in form restrains the defendant from refusing to perform the action required by the fiat or order of the court or judge.²

¹ Adam's Eq. 194, 195, 358, 359; 1 Smith's Ch. Prac. 601-613; 3 Daniell, 276-281, 297, 298.

² Equity Rule 55.

³ 1 Smith's Ch. Prac. 585, 586, 587.

⁴ Adam's Equity, 218; *In re Lennon*, 166 U. S. 548; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Hervy v.*

Smith, 1 Kay & Johns. 389; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. New York & New Jersey Telephone Co.*, 42 N. J. Eq. 141; *Lane v. Newdigate*, 10 Ves. 194; *Rankin v. Huskisson*, 4 Sims. 13; *Spencer v. Birmingham Ry. Co.*, 8 Sim. 193, 198; *Attorney-General v. Manchester &*

Under the interstate commerce act, in a suit between railroads, the defendant companies were enjoined "from refusing to afford and extend to" the plaintiffs "the same facilities for an interchange of interstate business between" plaintiffs and defendants "as were enjoyed by other railway companies, and from refusing to receive from the plaintiff company cars billed from points in one state to points in another state which might be offered to the defendant companies by the plaintiff."¹

§ 525. Jurisdiction and power of the federal courts to grant injunctions.—The power of the federal courts to grant writs of injunction in suits prosecuted before them is derived alone from the federal constitution and laws; the power to grant such writs, and to administer such relief, is a part of the judicial power of the United States vested in the federal judiciary by the constitution, and distributed among and prescribed to the several courts of the system, by the laws enacted by congress. The supreme law declares that: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish."² And that: "The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction."³

The constitutional grant of judicial power embraces (1) "cases in law," and (2) "cases in . . . equity;" and these classes of cases are preserved throughout all the judiciary acts passed

Leeds Ry. Co., 8 Sim. 436; Earl of Mexborough v. Bower, 7 Beav. 127, 133.

¹ In re Lennon, 166 U. S. 548.

² U. S. Const., art. III, sec. 1.

³ U. S. Const., art. III, sec. 2.

by congress;¹ and the sixteenth section of the original judiciary act provided that "suits in equity shall not be sustained in either of said courts of the United States in any case where plain, adequate and complete remedy may be had at law,"² which was simply declaratory of the rule which then prevailed in the High Court of Chancery in England in the administration of equitable remedies.³

These constitutional and statutory provisions have had the effect to vest in the several courts of the United States, in cases over which they have jurisdiction, respectively, *full and complete equity power and jurisdiction*, as that jurisdiction was known, defined, distinguished and administered in England at the time of the adoption of the federal constitution, embracing, among other powers, the power to grant injunctions.⁴ In a case involving the equity jurisdiction and practice, and especially in regard to injunctions, in the circuit courts of the United States, Justice Story stated the doctrine as follows: "The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated

¹ 1 U. S. Stat. at L., ch. 20, p. 73; 18 U. S. Stat. at L., ch. 137; 24 U. S. Stat. at L., ch. 373; 25 U. S. Stat. at L., ch. 866.

² 1 U. S. Stat. at L., ch. 20, sec. 16.

³ *McConihay v. Wright*, 121 U. S. 201; *Whitehead v. Shattuck*, 138 U. S. 146.

⁴ *Robinson v. Campbell*, 3 Wheat. 212; *Boyle v. Zacharie*, 6 Pet. 658;

United States v. Howland, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Story v. Livingston*, 13 Pet. 357; *Noonan v. Lee*, 2 Black, 499; *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864; *In re Sawyer*, 124 U. S. 209, 211; *Fenn v. Holme*, 21 How. 481, 487; *Thompson v. Railroad Co.*, 6 Wall. 134; *Heine v. Levee Commissioners*, 19 Wall. 655.

by those acts, the courts of the United States may, from time to time, prescribe. So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland.”¹

§ 526. Same — Federal courts may grant injunction where it may be granted by English chancery.— Full and complete chancery jurisdiction is conferred on the courts of the United States, in the classes of cases of which they have cognizance, with the limitation that suits in equity shall not be sustained by them where plain, adequate and complete remedy may be had at law. The rules of the High Court of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts in the classes of cases committed to them by the constitution and laws of the United States. In the exercise of this jurisdiction the courts of the Union are not limited by the chancery systems adopted by a state, and they exercise their functions in a state where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. The remedies in equity in the courts of the United States are the same, and are to be granted and administered according to the principles, usages and remedies in equity in England at the time our government was established; and where, under the English chancery system, relief by injunction can be given, the same or similar relief may be given by the courts of the United States.²

§ 527. Writs of injunction granted by supreme court justices and circuit court judges.—“ Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any

¹ Boyle v. Zacharie, 6 Pet. 658.

saw Mining Co. v. South Carolina,

² State of Pennsylvania v. The 144 U. S. 550; Georgia v. Brailsford, 2 Dall. 402.
Wheeling Bridge Co., 13 How. 563 et seq.; In re Debs, 158 U. S. 577; Co-

case pending in the circuit to which he is allotted elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district."¹ When a suit in equity is pending in a circuit court of the United States and the plaintiff desires to make application for the issuance of a preliminary writ of injunction in such suit, and the judge of the district court for that district, and the judge of the circuit court of that circuit, and the justice of the supreme court allotted to that circuit, are all absent from and without the district and circuit, another justice of the supreme court has jurisdiction at any place in the United States to hear and determine such application for an injunction.² The circuit judges and district judges cannot hear an application for an injunction when they are outside of the circuit where the suit is pending; and the exception in the statute allowing the application to be made to a justice of the supreme court outside of the circuit where the suit is pending, "when it cannot be heard by the circuit judge of the circuit or the district judge of the district," is intended to prevent a failure of justice; and such a failure of justice would as effectually ensue when the inability of the local judges to hear the application arose from one cause as from another.³

§ 528. Writs of injunction granted by district judges.— "An injunction shall not be issued by a district judge, as one of the judges of a circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court."⁴ An injunction issued by the order of a district judge in vacation expires by operation of law at the next ensuing term of the circuit court, unless it is continued in force by an order of the court.⁵ This provision of the statute

¹ U. S. R. S., sec. 719.

² *United States v. L. & P. Can. Co.*, 4 Dill. 601, Fed. Cas. 15,633; *Searles v. Jacksonville, P. & M. R. Co.*, 2 Woods, 621, Fed. Cas. 12,586.

³ *Searles v. Jacksonville, P. & M. R. Co.*, 2 Woods, 621, Fed. Cas. 12,586.

⁴ U. S. R. S., sec. 719.

⁵ *Parker v. Judges*, 12 Wheat. 561; *In re Dudley*, Fed. Cas. 4,114; *Gray v. Chicago, Iowa & N. R. Co.*, 1 Woodw. 63, Fed. Cas. 5,713.

is still in force; but it does not mean that the circuit court when held by the district judge cannot issue the writ as fully and freely in all respects as when held by the circuit justice or judge, or by both. The district judge has full and unrestricted power to hold the circuit court for all purposes, including the issuance of writs of injunction; while sitting as circuit judge, his power and authority are co-extensive with the power and authority of any other judge sitting in the same court. The meaning of this statutory provision is, that if the district judge as such, and not as the court, shall in vacation order the issuance of an injunction, it continues in force no longer than to the term of the circuit court next ensuing, unless so ordered by the circuit court.¹

§ 529. No injunction granted until after bill filed.—An injunction will not be granted except upon a bill filed for the purpose of specifically praying an injunction; nor will an injunction be granted against any one who is not a party to the suit. Courts of equity adhere very closely to the principle that you cannot have an injunction except against a party to the suit.² No process, not even a subpoena, is allowed to issue from the clerk's office in any suit in equity in the United States courts until the bill is filed in the clerk's office.³ One of the articles of impeachment against Wolsey was that he "granted injunctions without bill."⁴ It is stated by one writer on the subject that the bill should be filed before the *application for the writ can be made*.⁵

§ 530. Same — Bill must contain a special prayer for writ of injunction.—According to the English practice, if the plaintiff requires a writ of injunction against the defendant, he must not only pray for it in the prayer for relief, but also in the prayer for process.⁶ But in equity suits, the prayer for in-

¹ Goodyear Dental V. Co. v. Fulson, 3 Fed. R. 509.

² 3 Daniell, 297, 298; 1 Smith's Ch. Prac. 586; Fellows v. Fellows, 4 Johns. Ch. 25; Scott v. Donald, 165 U.S. 107, 117; Iveson v. Harris, 7 Ves. 257; Dawson v. Princeps, 2 Anst. 521; Gadd v. Worrall, 2 Anst. 555.

³ Equity Rule 11.

⁴ 1 Spence, 370, note f.

⁵ 1 Smith's Ch. Prac. 586.

⁶ Redesdale (6th Am. ed.), 54, 55; 1 Daniell, 500-503; 1 Smith's Ch. Prac. 85, 86, 87.

junction is regulated by the equity rules, which provide that: "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall be specially asked for;"¹ and "if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process."²

§ 531. Bills for injunction* must be verified.—Every bill filed to obtain a writ of injunction should be supported by an affidavit of merits verifying the statements in the bill; the affidavit is usually made by the plaintiffs, or some of them, but it may be made by any person acquainted with the facts; when the affidavit is made by an agent, an excuse must be shown why it is not made by the plaintiff. When the plaintiff swears to the bill upon information and belief, he should annex to the bill the affidavit of the person from whom he obtained the information, or the affidavit of some other person who can positively swear to the truth of the material allegations of the bill.³

§ 532. No provisional special writ of injunction granted without notice.—By an early act of congress it was provided that no writ of injunction shall "be granted in any case without previous notice to the adverse party, or his attorney, of the time and place of moving for the same."⁴ Under this statutory provision, Chief Justice Ellsworth held that: "The provision contained in the statute, that writs of injunction shall not be granted without reasonable notice to the adverse party or his attorney, extends to injunctions granted by the supreme court or the circuit court, as well as to those that may be granted by a single judge. The design and effect, however, of injunctions, must render a shorter notice reasonable notice, in the case of an application to a court, than would be so construed

¹ Equity Rule 21.

² Equity Rule 23.

³ 1 Smith's Ch. Prac. 595, 596; Attorney-General v. Bank of Chenango, Hopk. Ch. 596; Campbell v. Morris,

7 Paige Ch. 157; Bank of Orleans v. Skinner, 9 Paige Ch. 305; Youngblood v. Schamp, 15 N. J. Eq. 43.

⁴ 1 U. S. Stat. at L., ch. 22, sec. 5, pp. 334, 335.

in most cases of an application to a single judge; and until a general rule shall be settled, the particular circumstances of each case must also be regarded.”¹ The express requirement of notice contained in this statute was omitted in the revision; but it is clearly evident from the several provisions of the Revised Statutes that it is contemplated and intended that the requirement of notice shall still be observed, at least in cases of special injunctions.² Be that as it may, the practice is controlled by an equity rule, promulgated in 1842, which is imperative that special injunctions shall not be granted without “due notice” to the adverse party. The full text of the rule is:

“Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.”³

§ 533. Same — Temporary restraining order pending application for special injunction.—In order to prevent irreparable injury after notice, and before the application for an injunction can be heard, it is provided by an act of congress, approved June 1, 1872, that: “Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.”⁴

¹State of New York v. State of Connecticut, 4 Dall. 1.

²U. S. R. S., secs. 718, 719.

³Equity Rule 55.

⁴17 U. S. Stat. at L., ch. 255, sec. 7, p. 197; U. S. R. S., sec. 718.

§ 534. Same—Same—Application for special injunction—Procedure.—The usual and proper procedure in applying for special injunctions is as follows: The plaintiff files his bill, and an entry thereof is made upon the order book, as in other cases; he also prepares a written application, either a motion or a petition, addressed to the court, praying for the issuance of the writ upon the averments of the bill. The application, together with the bill, is presented to the court, or to a judge thereof at chambers; and, upon such presentation, the court or judge makes an order in the cause, setting the application down for hearing at a particular time and place in such order designated, and directing that the application be filed, and the order duly entered (on the order book if in vacation, on the minutes of the court if in term), and that a certified copy of the order be served upon the defendant by the marshal, and that a precept or writ of execution in chancery, with such copy of the order attached, be issued by the clerk, directed to the marshal, commanding him to serve the same upon the defendant. The order is then delivered or transmitted to the clerk, who enters the same, and issues and delivers to the marshal the copy and precept, which are by him served and returned, as in the order directed. “At the time and place ordered,” the court hears the application; the rule directs that the injunction shall not issue until “after a hearing;”¹ at such hearing, either party may read affidavits, and the plaintiff may read any admissions in the defendant’s answer, if it has been filed.² If the injunction is granted, an order is accordingly made and entered, and the clerk issues the writ in strict conformity therewith; the writ of injunction, when issued, should upon its face apprise the party upon whom it is served precisely what he is restrained from doing, without the necessity of resorting to the bill to ascertain what the injunction means.³ If a bond is required by the order of the court, the writ is not issued until the bond has been executed. The writ of injunction shall be under the seal of the court from which it is issued, and shall be signed by the clerk of such court, and shall bear teste of the chief justice of the

¹ Equity Rule 55.

² 3 Daniell, 275, 297.

³ Sickels v. Borden, 4 Blatchf. 14,

Fed. Cas. 12,833; Sullivan v. Judah, 4

Paige Ch. 444; Moat v. Holbein, 2

Edw. Ch. 188.

United States, or, when that office is vacant, of the associate justice next in precedence, and shall bear teste from the date on which it is issued.¹

§ 535. Injunction bond — Condition.— When an injunction is applied for in a circuit court of the United States, the court grants it or not according to the established principles of equity, and not according to the laws and practice of the state; and the court requires a bond or not from the plaintiff, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice; and if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also; and the proper condition of the injunction bond is to answer all damages which the defendant in the suit may sustain in consequence of the injunction being granted, should the same thereafter be dissolved.²

§ 536. Motions to dissolve injunctions — Abatement.— If the defendant desires to dissolve an injunction, he files a motion or petition praying the dissolution and setting forth the grounds upon which he expects to obtain it, and serves a copy upon the adverse party or his counsel.³ An injunction is not dissolved, neither does it become inoperative, by the abatement of the suit in which it was issued. But the rule is that, if the suit abates by the death of either the plaintiff or the defendant, the party against whom the injunction issued, or his representatives, may have an order requiring the plaintiff or his representatives to revive within a stated time, or that the injunction be dissolved. Where a suit abates by the death of the plaintiff, those who succeed to his rights may apply to the court to punish a breach of an injunction, which has taken place either before or after his death, as soon as they have taken the preliminary steps to revive the suit, either by filing a bill of revivor or otherwise. And it is not necessary for them to wait until a decree of revivor is actually obtained.⁴ Although a bill in equity which relates exclusively to the separate estate of the wife, in which the husband has no interest,

¹ U. S. R. S., secs. 911, 912.

³ 1 Smith's Ch. Prac. 600, 601, 602.

² *Bein v. Heath*, 12 How. 168; *Russell v. Farley*, 105 U. S. 433.

⁴ *Hawley v. Bennett*, 4 Paige Ch. 163, 164.

filed by the husband for himself and wife, instead of being filed by the next friend of the wife, is demurrable because filed by the husband, yet such an objection cannot be urged as a ground for dissolving an injunction, as such objection is one of form merely, and may be corrected by amendment.¹

§ 537. **Motion to dissolve the common injunction.**— In the practice in the High Court of Chancery of England, where the technical distinctions between common and special injunctions were strictly upheld, there were material differences in the proceeding to dissolve the common injunction and proceedings to dissolve special injunctions; and these distinctions and differences must be borne in mind, in order to understand the American and English cases in regard to practice upon motions to dissolve injunctions. It must be borne in mind that a common injunction is, in the English practice, one which is granted to stay proceedings at law, as a matter of course, upon the default of the defendant to appear or answer, or upon matter confessed in the answer where no default is made. A motion to dissolve such an injunction, obtained upon the default of the defendant, is stated by an English author substantially as follows:

A defendant moves to dissolve the common injunction to restrain proceedings at law by order *nisi* and absolute, and not upon affidavit, and he cannot move until he has filed his answer; and the order *nisi* is equally necessary, whether the injunction only stays execution or has been extended to stay trial. If there be more defendants than one, although each defendant on filing his answer is at liberty to apply to dissolve the injunction as to himself, without regard to the state of the proceedings as to the other defendants, yet, if an action at law has been commenced by defendants jointly, the court will not dissolve the injunction until all the defendants have answered. Upon filing his answer, the defendant, upon petition or motion, may, as of course, obtain an order *nisi* to dissolve the common injunction, which is drawn up on the terms that, unless the plaintiff, having notice thereof, shall, on a day named, show unto the court good cause to the contrary, the injunction shall be dissolved; a copy of which order is served on the plaintiff.

¹ Ludlow v. Maddock, 1 Ch. Sent. 20.

iff or his solicitor. On the day named in the order the defendant is at liberty to move, as of course, that the order *nisi* may be made absolute, which is accordingly done, and the injunction thereby dissolved, unless the plaintiff appears by counsel and shows insufficiency or impertinence in the answer as cause, or undertakes to show cause on the merits why the injunction should not be dissolved. The plaintiff may show as cause against the dissolution of the injunction either of the following causes, viz.: (1) He may present exceptions to the answer for insufficiency. (2) He may present exceptions to the answer for scandal or impertinence. (3) He may show merits disclosed by the admissions of the answer, or by documents referred to in it or in the schedules thereto annexed, but not by affidavits. Where exceptions are shown as a cause, the order is that they be referred to a master; and, if the master finds and reports against the exceptions, the injunction is dissolved; if the exceptions are allowed, the injunction remains in force. If the plaintiff fails to show merits disclosed by the answer, where he resists the motion on that ground, the injunction will be dissolved.¹

§ 538. **Motions to dissolve special injunctions** — The rule as stated by Justice Story.—The granting and dissolving special injunctions rests in the sound discretion of the court, whether applied for before or after answer; and affidavits may, after answer, be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer. If the answer does not deny the material facts stated in the bill, or if the denial is merely upon information and belief, the answer furnishes no grounds for an application to dissolve a special injunction.² Where there is equity on the face of the bill, the rule is well settled that an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts which form that equity, and such denial, too, must be based on the personal knowledge of the defendant; and a denial on information and belief is not sufficient. It is in the sound discretion of the court to continue

¹ 1 Smith's Ch. Prac. 613-622. ² Poor v. Carlton, 3 Sumn. 70, Fed. Cas. 11, 272.

an injunction where the nature and circumstances of a case require it, and where justice will be attained by that course.¹

§ 539. Assessment of damages on dissolution of injunction.

Where upon the granting of an injunction no bond has been required, it is clear that, upon dissolving it, the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just. As a condition of granting a preliminary injunction the court may require the plaintiff to execute an injunction bond to answer the damages which the defendant may sustain in consequence of the injunction being granted. But the power to impose a condition implies the power to relieve from it; and where an injunction bond has been executed, it is within the discretion of the court to relieve the plaintiff from the penalty of the bond altogether, and refuse to allow the bond to be put in suit. If the court determines that the defendant may enforce the bond, it, having possession of the case, has power to have the damages assessed under its own direction, which is usually done by reference to a master, or it may allow the defendant to sue on the bond at law.² Counsel fees cannot be allowed as part of the damages covered by an injunction bond.³

§ 540. Injunctions to restrain proceedings at law.—A court of equity will not entertain a bill to restrain the prosecution of an action at law when the defendant in the action at law and plaintiff in the suit in equity has a perfect and complete legal defense, unless there are special circumstances which constitute a ground of equity and show that he cannot make his legal defense available at law.⁴ Equitable estoppel is a legal defense which may be interposed in a court of law to an action of ejectment;⁵ and in order to justify a resort to a court of equity to restrain an action at law where the defense is an

¹ *Nelson v. Robinson*, Hempst. 464, 386; *Hangerford v. Sigerson*, 20 How. Fed. Cas. 10,114. 156; *Insurance Co. v. Bailey*, 13 Wall.

² *Russell v. Farley*, 105 U. S. 433, 616, 628; *Grand Chute v. Winegar*, 15 Wall. 373; *Drexel v. Berney*, 122 U. S. 447.

³ *Oelrichs v. Spain*, 15 Wall. 211, 241.

⁴ *Dickerson v. Colgrove*, 100 U. S. 230, 231.

⁵ *Deweese v. Reinhard*, 165 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68.

equitable estoppel, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law.¹ Laches, though a good defense in equity, is no defense at law, and cannot be availed of by a defendant in an action of ejectment, but must be set up by a bill in equity to enjoin the prosecution of the suit at law.²

§ 541. Injunctions issued by federal courts to stay proceedings in state courts.—A federal statute provides that: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."³ It is well settled, upon both reason and authority, that the prohibition contained in this statute "does not apply where the federal court has first obtained jurisdiction, or where, the state court having first obtained jurisdiction, the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction has first attached." If the rule were otherwise, "after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter."⁴ The prohibition contained in this statute must be construed and applied in connection with the statutory provision that the courts of the United States "shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."⁵

¹ *Drexel v. Berney*, 122 U. S. 241.

² *Wherman v. Conkling*, 155 U. S. 326.

³ U. S. R. S., sec. 720.

⁴ *Sharon v. Terry*, 36 Fed. R. 365; *Fest v. Union Pac. R. Co.*, 10 Blatch. 520, Fed. Cas. 4,830; *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494; *Wagner v. Drake*, 31 Fed. R. 851; *Hamilton v. Walsh*, 23

Fed. R. 420; *Garner v. Second Nat. Bank*, 67 Fed. R. 833; *President of Bowdoin College v. Merritt*, 59 Fed. R. 6; *Hemsley v. Myers*, 45 Fed. R. 283; *Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co.*, 88 Fed. R. 815, 821; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, 82 Fed. R. 943.

⁵ U. S. R. S., sec. 716; *Fisk v. Union*

When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.¹ "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."²

§ 542. Injunctions to relieve against judgments—The rule stated by Chief Justice Marshall.—"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule, that a defense cannot be set up in equity which has been fully and fairly tried at law, although

Pac. R. Co., 10 Blatchf. 520, Fed. Cas. 4,830.

¹Harkrader v. Wadley, 172 U. S. 164; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Tay-

lor v. Taintor, 16 Wall. 366; Ex parte Crouch, 112 U. S. 178.

²Peck v. Jenness, 7 How. 612, 624; Taylor v. Carryl, 20 How. 596; Morgan v. Sturges, 154 U. S. 26.

it may be the opinion of that court that the defense ought to have been sustained at law. . . . The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself.”¹ This rule has been steadily adhered to by the supreme court.²

§ 543. Injunctions issued by federal courts against judgments in state courts.—Where there is diverse citizenship, and the matter in dispute exceeds, exclusive of interest and cost, the sum or value of \$2,000, a circuit court of the United States, in the exercise of its equity jurisdiction, may enjoin a party from availing himself of the benefit of a judgment fraudulently obtained by him in a state court; such a proceeding is a new and independent suit, arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.³

§ 544. Injunction to restrain threatened defense to a “proposed action at law.”—Bills in equity to enjoin actions at law are not infrequently brought by defendants in such actions to enable them to avail themselves of defenses which would not be valid at law; and the circuit courts of the United States may sustain a bill in equity “in favor of a plaintiff in a proposed action at law, to enjoin the defendant from setting up a threatened defense, upon the ground that he is equitably estopped from so doing,” unless the plaintiff's remedy at law be plain, adequate and complete.⁴

§ 545. Restraining the prosecution of suits in foreign jurisdictions.—In a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prose-

¹ *Marine Insurance Co. v. Hodgson*, 7 Cranch, 336. *How. 443; Truly v. Wanzer*, 5 How. 141.

² *North Chicago Rolling Mill Co. v. St. Louis Ore & S. Co.*, 152 U. S. 596; *Marshall v. Holmes*, 141 U. S. 589; *Johnson v. Christian*, 128 U. S. 374; *Brown v. Buena Vista County*, 95 U. S. 157; *Crim v. Handley*, 94 U. S. 652; *Hendrickson v. Hinckley*, 17

³ *Marshall v. Holmes*, 141 U. S. 589; *Barrow v. Hutton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640; *Arrow-smith v. Gleason*, 129 U. S. 86, 101; *Harwood v. Railroad Co.*, 17 Wall. 80; *Gaines v. Fuentes*, 92 U. S. 10; *Wickliffe v. Eve*, 17 How. 470.

⁴ *Davis v. Wakelee*, 156 U. S. 680.

cution of suits in another state. The exercise of such power is in accordance with the well-settled principles of equity jurisprudence and practice, both in England and America, and the federal constitution does not prescribe a different rule; and the determination of what is a proper case for equity interposition is reposed in the court whose authority is invoked. In such cases the court, having jurisdiction of the parties, acts *in personam*.¹

§ 546. **Injunction to restrain collection of taxes.**—It has been repeatedly and uniformly held by the supreme court of the United States, that, in a proper case for equity interposition, a bill in equity will lie in the circuit courts of the United States to restrain the seizure of property in the collection of taxes imposed in contravention of the constitution of the United States.² But a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal or unconstitutional; there must exist, in addition, special circumstances bringing the case under some head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of the plaintiff.³ Whether or not the particular case presented by the

¹ *Cole v. Cunningham*, 133 U. S. 107, 116, citing and discussing the following authorities: *Penn. v. Lord Baltimore*, 1 Ves. Sen. 444; 2 Lead. Cas. in Eq. (4th Am. ed.) 1806; *McIntosh v. Ogline*, 4 T. R. 193, n.; s. c., 3 Swanston, 365, n., s. c., 1 Dic. Ch. 119; *Massie v. Watts*, 6 Cranch, 148; *Pennoyer v. Neff*, 95 U. S. 714, 723; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464; *Lord Portarlington v. Soulby*, 3 Mylne & K. 104, 106; *Earl of Oxford's Case*, 1 Ch. R. 1; 2 Lead. Cas. in Eq. 1316; *Story's Eq. Jur.*, §§ 899, 900; *Phelps v. McDonald*, 99 U. S. 298, 308; *Snook v. Snetzer*, 25 Ohio St. 516; *Keyser v. Rice*, 47 Md. 203; *Burlington & Missouri R. Co. v. Thompson*, 31 Kan. 180; *Zimmerman v. Franke*, 34 Kan. 650; *Wilson v. Joseph*, 107 Ind. 490;

Chaffee v. Quidnick Co., 13 R. I. 442, 449; *Great Falls Manufacturing Co. v. Worster*, 23 N. H. (3 Foster), 462; *Pickett v. Ferguson*, 45 Ark. 177; *Mead v. Meritt*, 2 Paige, 402, 404; *Vail v. Knapp*, 49 Barb. 299, 305; *Burgess v. Smith*, 2 Barb. Ch. 276; *Dinsmore v. Neresheimer*, 32 Hun, 204; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *Sercomb v. Catlin*, 128 Ill. 556; *Dehon v. Foster*, 4 Allen, 545.

² *In re Tyler*, 149 U. S. 164, 188; *Osborn v. Bank*, 9 Wheat. 738; *Dodge v. Woolsey*, 18 How. 331; *Allen v. Baltimore & Ohio R. Co.*, 114 U. S. 331; *In re Ayers*, 123 U. S. 443; *Shelton v. Platt*, 139 U. S. 591.

³ *Shelton v. Platt*, 139 U. S. 591; *Allen v. Pullman Palace Car Co.*, 139 U. S. 658; *Dows v. Chicago*, 11 Wall. 108, 112; *Lyon v. Alley*, 130 U. S. 177;

bill is one calling for equitable interposition and relief by injunction, must, in the first instance, be determined by the circuit court, and its action cannot be treated as a nullity.¹ It has been laid down by the supreme court of the United States, with unanimity, as a rule to govern the courts of the United States in their actions in such cases, that an injunction to stay the collection of taxes shall not be granted, until the plaintiffs have first paid the part of the tax which is conceded to be due, or which can be seen to be due on the face of the bill, or which can be shown by affidavits to be due, whether conceded or not; and if the proper officer refuses to receive a part of the tax, the part actually due must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.²

§ 547. Same — Overvaluation of property for taxation.—

“It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most com-

Union Pac. R. Co. v. Ryan, 113 U. S. 575, 616, 617; Albuquerque v. National Bank, 147 U. S. 87; Northern Pacific R. Co. v. Clark, 153 U. S. 252, 272; 219.

¹ In re Tyler, 149 U. S. 164, 188. National Bank v. Kimball, 103 U. S.

² State Railroad Taxes Case, 92 U. S. 732, 733.

mon objects before them — of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with when designed and manifest departures from the rule are avoided. To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the valuation of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed. When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is due.”¹

§ 548. Same — Same — National bank stock — The National Banks Act provides that: “Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located

¹ Stanley v. Supervisors, 121 U. S. 49-52; Bruecher v. Port Chester, 101 535, 552, citing Cumming v. National N. Y. 240-244; Lincoln v. Worcester, Bank, 101 U. S. 153; Newman v. Su- 8 Cush. 55-63; Hicks v. Worcester, pervisors, 45 N. Y. 676-687; Nat. 130 Mass. 478; Balfour v. Portland, Bank of Chenung v. Elmira, 53 N. Y. 28 Fed. R. 738.

within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or county where the bank is located, and not elsewhere. Nothing herein contained shall be construed to exempt the real property of associations from either state, county or municipal taxes to the same extent, according to its value, as other real property is taxed.”¹ The decisions of the supreme court of the United States, construing and applying this statute, have established the following legal propositions, viz.:

1. That the words “at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens” refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the act of congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares, and of other moneyed investments or capital, the state law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital.

2. That a state law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital.

3. National banks occupy toward their stockholders a fiduciary capacity, as their agents; that such banks occupy a trust relation which authorizes a court of equity to see that they are protected in the exercise of their duties growing out of such relation; that such banks may, as trustees, maintain a suit in equity on behalf of their shareholders to enjoin the collection

¹ U. S. R. S., sec. 5219.

of an illegal tax upon its shares, upon paying or tendering what is actually due.¹

§ 549. Injunctions against unlawful restraint of trade and commerce.—The circuit courts of the United States are invested with jurisdiction to prevent and restrain violations of the act of congress, approved July 2, 1890, entitled “An act to protect trade and commerce against unlawful restraints and monopolies.” That act provides that: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . Every contract, combination in form of trust or otherwise, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. . . . The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court

¹ *Hill v. Exchange Bank*, 105 U. S. 101 U. S. 143; *Boyer v. Boyer*, 113 U. S. 319; *Cumming v. National Bank*, 101 U. S. 689, 694, 695; *People v. Weaver*, U. S. 153; *Pelton v. National Bank*, 100 U. S. 539; *Evansville Bank v.*

may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.”¹ This statute applies to railroads, and it renders illegal a contract between competing railroads relating to traffic rates for the transportation of articles of commerce between the states, provided such contract by its direct effect produces a restraint of such trade or commerce, and its execution and carrying out of such contract may be enjoined in the circuit courts of the United States, at the suit of the government; and, in order to maintain such suit, it is not necessary for the government to prove that the contract was made with intent to restrain trade or commerce in violation of the act of congress, if the contract necessarily has that effect.²

Britton, 105 U. S. 323; Supervisors v. Stanley, 105 U. S. 305; Stanley v. Supervisors, 121 U. S. 550.

¹ 26 U. S. Stat. at L., ch. 647, §§ 1, 2, 3, 4, pp. 209, 210.

² United States v. Freight Ass’n, 166 U. S. 290.

The full text of the act of congress mentioned in this section is as follows:

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories, and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be

§ 550. Same — Not granted by federal courts to restrain monopoly in necessary of life.— The monopoly and restraint denounced by the act of congress are the monopoly and restraint of interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life.¹ In the case cited the bill was filed to suppress a monopoly in the manufacture or sale of refined sugar, alleging that such mo-

punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition, setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoena to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person" or "persons," wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Approved July 2, 1890.

¹ United States v. E. C. Knight Co., 156 U. S. 1, 9, 18.

nopoly was in violation of the act of congress to protect trade and commerce against unlawful restraints and monopolies, and that, under the act, the circuit court had jurisdiction to suppress the monopoly by preliminary and perpetual injunction; and Chief Justice Fuller, delivering the opinion of the court, and holding that the power invoked belonged to the states and not to the general government, said:

“The fundamental question is, whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of congress in the mode attempted by this bill. It cannot be denied that the power of a state to protect the lives, health and property of its citizens, and to preserve order and the public morals, ‘the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of the exclusive power to regulate it, it was left free except as congress might impose restraints. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states, and if a law passed by a state in the exercise of its acknowledged powers comes in conflict with that will, the

congress and the states cannot occupy the position of equal opposing sovereignties, because the constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce undoubtedly is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may suppress monopoly directly and set aside the instruments which have created it. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

"It is vital that the independence of the commercial power and of the police power, and the delineation between them, however sometimes perplexing, should always be recognized and observed; for while the one furnishes the strongest bond of union, the other is essential to the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress

them, of more serious consequences by resort to expedients of even doubtful constitutionality.

“It will be perceived how far-reaching the proposition is, that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. . . . ‘No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.’ . . . Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be

an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy.

“Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

“It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the right of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted.”¹

§ 551. Injunctions against unlawful restraint of the import trade.—The circuit courts of the United States are invested with jurisdiction to prevent and restrain violations of the seventy-third section of the act of congress of August 27, 1894, being “An act to reduce taxation, to provide revenue for the government, and for other purposes.” That portion of the act relating to this subject is as follows:

“Sec. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint

¹ United States v. E. C. Knight Co., 156 U. S. 1, 9, 18.

of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any portion of the United States of any article or articles imported or intended to be imported into the United States, or of any manufactured article into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

“Sec. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.”¹

§ 552. Injunctions against violations of the acts to regulate interstate commerce.—The federal constitution provides that, “the congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;”² and congress has exercised the power granted in respect to interstate commerce in

¹ 28 U. S. Stat. at L., ch. 349, secs. 73, 74, p. 570.

² U. S. Const., art. II, sec. 8, p. 3.

a variety of legislative acts.¹ As, under the constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and congress by virtue of such grant has assumed actual and direct control of those matters, it follows that the national government may prevent any unlawful and forcible interference therewith; and the circuit courts of the United States have jurisdiction to grant, at the suit of the government, writs of injunction to prevent such interference, and to punish for contempt any disobedience of such writs.² In the case just cited, Justice Brewer, delivering the opinion of the court, said:

“We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this community. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon its highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of

¹ 14 U. S. Stat. at L., ch. 124, p. 66; U. S. R. S., sec. 5258; 17 U. S. Stat. at L., ch. 252, p. 584; U. S. R. S., secs. 4386, 4389; 23 U. S. Stat. at L., ch. 60, sec. 6, pp. 31, 32; 24 U. S. Stat. at L., ch. 104, p. 379; 25 U. S. Stat. at L., ch. 382, p. 855; 26 U. S. Stat. at L., ch. 128, p. 743; 25 U. S. Stat. at L., ch. 1063, p. 501; 27 U. S. Stat. at L., ch. 196, p. 531.

² In re Debs, 158 U. S. 564.

those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution of any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail — an obstruction not only temporarily existing, but threatening to continue; that under such complaint the circuit court had power to issue its process of injunction; that it having been issued and served on these defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power ‘to punish by fine or imprisonment . . . disobedience . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command,’ and enter the order of punishment complained of; and finally, that, the circuit court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court.”¹

The interstate commerce act provides that: “Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier en-

¹ In re Debs, 158 U. S. 564.

gaged in like business.”¹ Under this provision, a circuit court of the United States has jurisdiction to issue, at the suit of one railroad company engaged in interstate commerce, a mandatory injunction against another railroad engaged in interstate commerce, its officers, agents, servants and employees, enjoining them from refusing to afford and extend to the plaintiff company the same facilities for an interchange of interstate business between the companies as were enjoyed by other railway companies, and from refusing to receive from the plaintiff company cars billed from points in one state to points in another state, which might be offered by the plaintiff to the defendant; and a locomotive engineer in the service of the defendant company, though not a party to the suit, having received actual notice of the injunction, is bound to obey it, or incur the penalties of contempt.² The circuit courts of the United States have jurisdiction to issue writs of injunction, either mandatory or prohibitory, at the suit of the Interstate Commerce Commission, against any railroad company, restraining it from acting in violation of any lawful order of such commission.³

§ 553. Injunctions against infringement of common-law trade-marks.—The right to adopt or use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has long been recognized by the common law; the property in such trade-marks, and the right to their exclusive use, rest on the law of the states; it is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement, and, pending suit, the right will, in a proper case, be protected by a provisional injunction. And where diverse citizenship and the jurisdictional amount exist, the circuit courts of the United States will interpose, by injunction, to protect the common-law rights of parties in trade-marks.⁴

¹ 24 U. S. Stat. at L., ch. 104, sec. 3,
p. 380.

² *In re Lennon*, 166 U. S. 548.

³ 25 U. S. Stat. at L., ch. 382, secs.

1, 5.

⁴ *Trade-mark Cases*, 100 U. S. 91,
92, 93; *Ryder v. Holt*, 128 U. S. 525;
Menendez v. Holt, 128 U. S. 514.

§ 554. Injunctions against infringement of registered trade-marks.— By the provisions of an act of congress passed March 3, 1881, owners of trade-marks used in lawful commerce with foreign nations, or with the Indian tribes, may, under certain restrictions in the act prescribed, obtain registration of such trade-marks in the United States patent office; and, if any person shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under the act and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, the party aggrieved shall have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful acts; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy. But no suit shall be maintained under the provisions of the act in any case when the trade-mark is used in any unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or under any certificate of registry fraudulently obtained. Nothing in the act, it is declared, shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of the act had not been passed. Registration of a trade-mark shall be *prima facie* evidence of ownership. Certificates of registry of trade-marks shall be issued in the name of the United States of America, under the seal of the department of the interior, and shall be signed by the commissioner of patents, and a record thereof, together with printed copies of the specifications, shall be kept in books provided for that purpose. Copies of trade-marks and of statements and declarations filed therewith and certificates of registry so signed and sealed shall be evidence in any suit in which such trade-marks shall be brought in controversy.¹

§ 555. Injunctions against infringements of copyrights.— A copyright cannot be sustained as a right existing at common

¹ 21 U. S. Stat. at. L., ch. 138, pp. 502-504.

law, but in the United States depends wholly upon the federal constitution and the laws enacted pursuant thereto by congress.¹ The constitution provides that congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."² The means for securing such rights to authors are prescribed by congress.³

By an act of congress approved March 3, 1891, amending the United States Revised Statutes in relation to copyrights, it is provided that the author, inventor, designer or proprietor of any book, map, charter, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person, shall, upon complying with the provisions of the act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States.⁴ Copyrights are granted for the term of twenty-eight years from the time of recording the title in the manner required by law;⁵ and the author, inventor, designer, if he be still living, or his widow and children, if he be dead, shall have the exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term, and shall within two months from the date of renewal cause a copy of the record thereof to be published in one or more newspapers printed in the United States for the space of four weeks.⁶

¹ *Wheaton v. Peters*, 8 Pet. 591, 662, 663; *Banks v. Manchester*, 128 U. S. 244.

² U. S. Const., art. I, sec. 8.

³ *Wheaton v. Peters*, 8 Pet. 591, 662, 663; *Banks v. Manchester*, 128 U. S. 244.

⁴ 26 U. S. Stat. at L., ch. 565, sec. 1, pp. 1106, 1107.

⁵ U. S. R. S., sec. 4953.

⁶ 26 U. S. Stat. at L., ch. 565, sec. 2, p. 1107.

And it is provided by federal statute that the circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any rights secured by the laws respecting copyrights according to the course and principles of courts of equity, on such terms as the court may deem reasonable.¹ In such suits for infringement, the court may refer the cause to a master to take and state an account of the damages of the plaintiff and decree payment of the same; "and the rule is well settled that, although the entire copyrighted work be not copied in an infringement, but only parts thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff."²

§ 556. Same — Dramatic and musical compositions — Procedure — Writ of injunction served anywhere in the United States.—By an act of congress approved January 6, 1897, entitled "An act to amend title sixty, chapter three, of the Revised Statutes, relating to copyrights," it is provided that:

"Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just. If the unlawful performance and representation be wilful and for profit, such person or persons shall be guilty of a misdemeanor, and upon conviction be imprisoned for a period not exceeding one year. Any injunction that may be granted upon hearing after notice to the defendant by any circuit court of the United States, or by a judge thereof, restraining and enjoining the performance or representation of any such dramatic or musical composition, may be served upon the parties against whom such injunction

¹ U. S. R. S., sec. 4970.

508; *Callaghan v. Myers*, 128 U. S.

² *Belford v. Scribner*, 144 U. S. 488, 617, 665.

may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other circuit court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the circuit court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The circuit courts or judges thereof shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit court in which said motion is made.

“The clerk of the court or judge granting the injunction shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.”¹

§ 557. Restraint of copyright frauds.—“No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every addition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as works of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: ‘Entered according to act of congress, in the year —, by A B, in the office of the librarian of congress, at Washington.’”² And “every person who shall insert or impress such notice, or words of the same

¹ 29 U. S. Stat. at L., ch. 4, pp. 481, 482.

² U. S. R. S., sec. 4962.

import, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph, or other article, whether such article be subject to copyright or otherwise, for which he has not obtained a copyright, or shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo or lithograph, or other article, bearing such notice of copyright, or words of the same purport, which is not copyrighted in this country, shall be liable to a penalty of \$100, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States; and the importation into the United States of any book, chromo, lithograph, or photograph, or other article, bearing such notice of copyright, when there is no existing copyright thereon in the United States, is prohibited; and the circuit courts of the United States sitting in equity are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the United States copyright laws, at the suit of any person complaining of such violation."

§ 558. Injunctions against infringements of patents for inventions.— It is provided by federal statute that: "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such

¹ 29 U. S. Stat. at. L., ch. 392, pp. 694, 695.

terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case. But in any suit or action brought for the infringement of any patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action.”¹ The court will not refuse plaintiff an injunction to restrain defendant from infringing his patent because the defendant is able to accomplish the same result by another and different method which is not an infringement of plaintiff’s patent.²

§ 559. Injunctions against executive state officers — No suit against a state maintainable.— In suits in equity in the circuit courts of the United States, to restrain the executive officers of a state from the performance, under color of office, of wrongful acts averred to be in violation of plaintiff’s rights, the objection is frequently made that the suit is, in legal effect, one against the state, and therefore not maintainable. In practice this objection has often, in the past, presented a material, delicate and difficult question for determination by the court, resulting in a long line of judicial precedents, extending from the organization of the federal judiciary down to the present time. Under the federal constitution as originally adopted, it was decided by the supreme court of the United States that a compulsory suit for the recovery of money against a state could be maintained in that court.³ This decision led to the

¹ 29 U. S. Stat. at L., ch. 391, secs. 1 and 6, pp. 692, 694.

² Du Bois v. Kirk, 158 U. S. 58.

³ Chisholm, Executor, v. Georgia, 2 Dall. 419.

adoption of the eleventh amendment to the constitution,¹ which is: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Since the amendment the judicial controversy has been, when and under what circumstances a suit against the executive officers of a state is, in legal effect, a suit against the state.

§ 560. Same—Rules announced by the United States supreme court since the eleventh amendment.—Since the adoption of the eleventh amendment the supreme court of the United States, in its decisions in suits against the executive officers of the states, has announced the following rules and principles which may be regarded as fully and finally settled, viz.:

(1) "The question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties." "The very object and purposes of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest pur-

¹ *Hollingsworth v. Virginia*, 3 Dall. 378. In this case, "The court, on the day succeeding the argument, delivered a unanimous opinion that, the amendment being constitutionally adopted, there could not be exercised

any jurisdiction in any case, past or future, in which a state was sued by citizens of another state, or by citizens or subjects of any foreign state." *New Hampshire v. Louisiana*; *New York v. Louisiana*, 108 U. S. 76.

poses of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." "The principle stated by Chief Justice Marshall, that, 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the eleventh amendment is limited to those suits in which the state is a party to the record,' has been qualified to a certain degree in some of the subsequent decisions of 'the supreme' court, and now it is the settled doctrine of the 'supreme' court that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the record to ascertain who are the real parties to the suit."¹

(2) "It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly it is equally well settled that a suit against the officers of a state to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself." The prohibition of the eleventh amendment applies "where the suit is brought against the officers of the

¹ *New Hampshire v. Louisiana*, and *503, 504; Pennoyer v. McConnaughy*,
New York v. Louisiana, 108 U. S. 76; 140 U. S. 1, 11, 12; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 388,
Poindexter v. Greenhow, 114 U. S. 270, 287; *In re Ayers*, 123 U. S. 443, 389.

state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."¹

(3) The prohibition of the eleventh amendment does not apply "where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such a suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a *mandamus*, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial — is not, within the meaning of the eleventh amendment, an action against the state."²

(4) The prohibition of the eleventh amendment does not apply where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of a statute which is perfectly valid and constitutional, but wrongfully administered by them, commit or threaten to commit acts of wrong and injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff.³

(5) "A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper

¹ *Pennoyer v. McConnaughy*, 140 U. S. 1, 8, 9, 10; *In re Ayers*, 123 U. S. 443; *Louisiana v. Jumel*, 107 U. S. 711; *Antonio v. Greenhow*, 107 U. S. 769; *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446; *Hagood v. Southern*, 117 U. S. 52; *New Hampshire v. Louisiana and New York v. Louisiana*, 108 U. S. 76; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 388, 389.

² *Pennoyer v. McConnaughy*, 140

U. S. 1, 10; *Osborn v. Bank of the United States*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Tomlinson v. Branch*, 15 Wall. 460; *Litchfield v. Webster County*, 101 U. S. 773; *Allen v. Baltimore & Ohio R. Co.*, 114 U. S. 811; *Board of Liquidation v. McComb*, 92 U. S. 531; *Poindexter v. Greenhow*, 114 U. S. 270.

³ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 388.

jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other.”¹

(6) “It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the state, if it choose to come in as a plaintiff as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.”²

(7) The prohibition of the eleventh amendment does not apply “where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.” In this class of cases, the defendant is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority in law was sufficient to protect him.³

(8) A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state,

¹ Board of Liquidation v. McComb, 92 U. S. 531, 541; Davis v. Gray, 16 Wall. 203, 216.

² Cunningham v. Macon & Brunswick R. Co., 109 U. S. 451, 452.

³ Cunningham v. Macon & Brunswick R. Co., 109 U. S. 451; Mitchell

v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Huger, 21 How. 305; Grisar v. McDowell, 6 Wall. 363; United States v. Lee, 106 U. S. 196.

or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for such defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act.¹

(9) "It may be laid down as a general proposition, that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."²

§ 561. Same — Restraint of state railroad commissions.— There is a commerce wholly within the state which is not subject to the constitutional provision giving congress the power to regulate commerce among the several states; and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized by the supreme court of the United States in construing and applying the commerce clause of the federal constitution.³

A state has the power to regulate the fares and freights for the transportation of persons and property which begin and end within its limits, which may be charged and collected by railroads and other common carriers doing business within the state. But this power is not without just limitations. The

¹ *Poindexter v. Greenhow*, 114 U. S. 288. *Co. v. Illinois*, 118 U. S. 557, 565; *The Daniel Ball*, 10 Wall. 557; *Hall v. De Cuir*, 95 U. S. 485; *Telegraph Co. v. Texas*, 105 U. S. 460.

² *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 391.

³ *Wabash, St. Louis & Pacific Ry.*

power to regulate is not a power to destroy; and regulation is not the equivalent of confiscation. "Under the pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." The tariff of charges prescribed by the state must be reasonable. The regulation of fares and freights may be carried on by means of a railroad commission, which is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. The formation of a tariff of charges for the transportation by common carriers of persons and property is a legislative or administrative function, and not a judicial function; but the reasonableness of such a tariff of charges when formed and prescribed, whether by the state or the common carrier, is a judicial question to be determined by the judicial power upon process of law, pleadings, issues and proofs. "It has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work "practical destruction to rights of property, and, if found so to be, to restrain its operation." The adjudicated cases "all support the proposition that while it is not the province of the court to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty

to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. . . . It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public use without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."¹ The validity and constitutionality of an act of a state legislature, creating a railroad commission and investing it with power to form and prescribe a tariff of rates for the transportation of persons and property, will not oust the federal courts of jurisdiction to entertain a suit in equity to restrain the enforcement of such a tariff, when it is unreasonable and unjust; a valid law may be wrongfully administered by the railroad commission of a state, and so as to make such administration an illegal burden and exaction upon the railroads and other common carriers doing business in the state.²

§ 562. Injunction to restrain waste and trespass.—A reversioner may have an injunction against the tenant for life who threatens and insists on his right to commit waste; and a threat to commit waste is sufficient to entitle the plaintiff to the injunction.³ It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title

¹ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394 *et seq.*; *Railroad Commission Cases*, 116 U. S. 307, 331; *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & Northwestern Ry. Co.*, 94 U. S. 164; *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 565; *Dow v. Beidleman*, 125 U. S. 680, 689; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 342, 346; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413.

² *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

³ 1 *Smith's Ch. Prac.* 588-590.

was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title.¹ The timber growing upon mortgaged land constitutes a portion of the realty; it is embraced in the pledge of the land as security; and, after default in the mortgage debt, the mortgagor has no right to cut and sell the timber, and may be restrained from so doing, upon a proper application, by a court of equity.² It is well settled that equity will restrain a trespass, even where there is a remedy at law, to prevent irreparable injury, or to prevent a multiplicity of suits, or to prevent the destruction of the value of the inheritance.³

§ 563. Injunction to restrain nuisances, private and public.—The jurisdiction of courts of equity, concurrent with courts of law, in cases of private nuisance, dates back to an early period in the growth of the English equity system, and it is now too firmly established to be shaken; but the jurisdiction is not without limitation. A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property may ensue. In cases of nuisance, a court of equity will give its aid to prevent oppression and interminable litiga-

¹ Erhardt v. Boaro, 113 U. S. 537.

² Brady v. Waldron, 2 Johns. Ch. 148; Hutchins v. King, 1 Wall. 53.

³ Livingston v. Livingston, 6 Johns. Ch. 497; Harson v. Gardiner, 7 Ves. 305; Mitchell v. Dors, 6 Ves. 147; Hamilton v. Worsefold, 10 Ves. 290; Thomas v. Oakley, 10 Ves. 184; Crock-

ford v. Alexander, 15 Ves. 138; Tworl v. Tworl, 16 Ves. 128; Kender v. Jones, 17 Ves. 110; Earl Cowper v. Baker, 17 Ves. 128; Field v. Beaumont, 1 Swanst. 208; Garstin v. Asplin, 1 Madd. Ch. 150; New York Printing & Dyeing Establishment v. Fitch, 1 Paige Ch. 97.

tion, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction.¹ That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and, when the causes of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.² Where a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law; and, if the injury would be irreparable, a court of equity will, upon bill filed for that purpose, interpose by injunction.³ "A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated; and the person who caused it may be punished. If any particular individual may have sustained special damage from the erection of it, he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury in common with the community at large. Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general. This jurisdiction seems to have been acted on with great caution and hesitancy. Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and, accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it. The court of equity also, pursuing the analogy

¹Parker v. Winnipiseogee Lake Cotton & Woollen Co., 67 U. S. (2 Black), 545, 551 and authorities cited.

²Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317.

³Gilman v. Philadelphia, 3 Wall. 317; Mississippi & Missouri R. Co. v. Ward, 67 U. S. (2 Black), 486.

of the law, that a party may maintain a private action for special damage, even in the case of public nuisance, will now take jurisdiction in case of a public nuisance at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy. In case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a standing in a court of equity unless he avers and proves some special injury.”¹ A proceeding by bill in equity to restrain a nuisance “is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief, in the case of a private nuisance, as in either of the cases named.”² A court of equity has jurisdiction of a bill filed by a state to enjoin the defendant from digging, mining and removing phosphate rocks and deposits from the bed of a navigable stream within its territory. The grounds of equity jurisdiction in such cases are, substantially, those upon which courts of equity interfere in cases of waste, public nuisance and purpresture. The remedy at law for the protection of a state in such a case is not so efficacious or complete as a perpetual injunction against interference with its rights. Proceedings at law or by indictment can only reach past or present wrongs done, and cannot adequately protect the public interests in the future. “The jurisdiction of courts of equity to redress the grievance of public nuisances by injunction is undoubted and clearly established; but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals. . . . The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury that is likely to ensue.”⁴

¹ *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98, 99; *Crowder v. Tinkler*, 19 Ves. 616; *Corning v. Lowrerer*, 6 Johns. Ch. 439.

² *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518.

³ *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 564, 565, 566, 567.

⁴ *Attorney-General v. Brown*, 24 N. J. Eq. 89, 91; *Attorney-General v. New Jersey R. Co.*, 17 N. J. Eq. 136; *Jersey City v. City of Hudson*, 13 N. J. Eq. 420, 426; *Attorney-General v. Heishon*, 18 N. J. Eq. 410; *Morris & Essex R. Co. v. Prudden*, 20 N. J. Eq. 530, 532.

§ 564. *Same*—Obstruction of interstate commerce.—The forcible obstruction of the interstate transportation of persons and property, and the carriage of the mails, is a public nuisance; and the relations of the general government to interstate commerce and the transportation of the mails are such as to authorize a direct interference by it to prevent such forcible obstruction; and the circuit courts of the United States, sitting as courts of equity, have jurisdiction, upon a bill filed by the United States, to issue a provisional writ of injunction against such public nuisance, and to abate and perpetually enjoin it by final decree, and to punish as a contempt disobedience of their writs, orders and decrees.¹

“What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control and management. While under the dual system which prevails with us the powers of the government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state. . . . No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the state, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on these means alone was it expected to rely for the accomplishment of its ends. To impose upon it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measure uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. . . . We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws,

¹ In re Debs, 158 U. S. 564, 577.

and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield. 'This constitution, and all laws which shall be made in pursuance thereto, shall be the supreme law of the land.' . . . Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a postoffice system for the nation. Article I, section 8, of the constitution provides that 'the congress shall have power: . . . Third, to regulate commerce with foreign nations and among the several states, and with the Indian tribes. . . . Seventh, to establish postoffices and post-roads.' Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. . . . Under the power vested in congress to establish postoffices and post-roads, congress has, by a mass of legislation, established the great postoffice system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage.

"Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court, the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such manner as to obstruct interstate commerce. If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere volun-

tary association of individuals within the limits of that state has a power which the state itself does not possess?

“As, under the constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of congress to prescribe by legislation that any interference with these matters shall be an offense against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. . . . The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mail. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

“But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Grant that any public nuisance may be forcibly abated either at the instance of the authorities or by an individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of an appeal in an orderly way to the courts for a judicial determination and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . . ‘When the choice is between redress or prevention of injury by force and by peaceable process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the

latter.' So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their preventive powers. . . . Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in case of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case." ¹

§ 565. Summary of the ordinary objects of the writ of injunction.— According to the practice as developed in the High Court of Chancery¹ of England, the most ordinary objects of the writ of injunction, as enumerated by Mr. Eden, are: "To stay proceedings in the ordinary courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes or bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, or from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse, which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint of multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation. These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction." ²

¹ Justice Brewer, *In re Debs*, *supra*.

² Eden on Injunctions, 1, 2.

§ 566. **Injunctions in removal cases continued.**—“Whenever any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.”¹

§ 567. **No injunction against appointment or removal of public officers.**—Under the constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. And it is “well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative board or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by *mandamus*, prohibition, *quo warranto* or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by common law or by statute. No English case can be found of a bill for an injunction restraining the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow School, within its undoubted jurisdiction over public charities, was dismissed, so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: ‘This court, I apprehend, has no jurisdiction with regard either to the election or

¹ 18 U. S. Stat. at L., ch. 137, sec. 4, p. 471.

the amotion of corporators of any description.' In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well considered cases."¹

§ 568. No injunction to stay criminal proceedings.—A court of equity, although having jurisdiction over persons and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and the accused; and a circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such a state.²

§ 569. Breach of injunctions.—An injunction takes effect, and is in force and operation, on and from the date of the order granting it, and not merely from the time of sealing and service of the writ. The defendant, having notice of the order, is bound by it as soon as made; and he will be committed for breach of the injunction, after notice of its having been obtained, although neither the order nor the writ has been served upon him.³ An injunction to restrain proceedings at law is directed to the defendant, his counsel, attorneys and solicitors, and special injunctions are directed to the defendant, his servants, agents and employees; and if any persons acting in the character and capacities stated, having notice of the injunction, do anything inhibited by it, they will be guilty of contempt.⁴ Where an injunction was granted at the suit of one railroad

¹ In *re Sawyer*, 124 U. S. 200, 209, Ala. 320; *Morgan v. Nunn*, 84 Fed. R. 212; *White v. Berry*, 171 U. S. 366; 551; *Couper v. Smyth*, 84 Fed. R. 757; *Attorney-General v. Clarendon*, 17 Page v. Maffet, 85 Fed. R. 38; *Carr v. Gordon*, 82 Fed. R. 373, 379; *Taylor v. Kercheval*, 82 Fed. R. 497, 499.
² *Harkrader v. Wadley*, 172 U. S. 7 Ves. 488, 491; *Tappan v. Gray*, 9 161, 170.
³ *Daniell*, 279; 1 *Smith's Ch. Prac.* 7 Hill, 259; *Hagner v. Heyberger*, 7 623.
⁴ *Daniell*, 354, 369, 370, 371.
Watts & Serg. 104; *Updegraff v. Crans*, 47 Pa. St. 103; *Cochran v. McCleary*, 22 Iowa, 75; *Delahanty v. Warner*, 75 Ill. 185; *Beebe v. Robinson*, 52 Ala. 46; *Moulton v. Reid*, 54

company, against another railroad company, restraining the defendant from refusing to receive from the plaintiff cars billed from points in one state to points in another state, it was held by the supreme court of the United States that a locomotive engineer in the employ of the defendant company, who had received notice of the injunction and refused to obey it, was guilty of contempt. In that case, Justice Brown, delivering the opinion of the court, said: "The facts that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."¹

§ 570. Same — Contempt — Power to punish.— A federal statute provides that the courts of the United States shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."² Under this statute the circuit courts of the United States have power to punish in a summary manner for contempt any person who violates an injunction granted by them.³ The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United

¹ In re Lennon, 166 U. S. 548, 554.

² U. S. R. S., sec. 735.

³ In re Debs, 158 U. S. 564, 600; In re Lennon, 166 U. S. 548, 554.

States were called into existence and invested with jurisdiction over any subject they became possessed of this power. But the power has been limited and defined by the statute above quoted.¹ "The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its sufficiency. . . . 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexistent with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.'"²

§ 571. Same—Procedure in contempt cases.—Where a contempt has been committed by the violation of an injunction, the proper procedure is not to issue a rule to show cause why an attachment should not issue for a breach of the injunction; but the proper practice is that the plaintiff make a motion that the defendant shall stand committed for breach of the injunction, and the person proceeded against must have due and reasonable notice of the motion before it is made. An opportunity to be heard must be given to the party before he can be deprived of his liberty or amerced by fine.

¹ *Ex parte Robinson*, 19 Wall. 505, 510.

² *In re Debs*, 158 U. S. 564, 594, 595, 596; *In re Lennon*, 166 U. S. 548; *Case of Yates*, 4 Johns. 314, 369, 371; *Watson v. Williams*, 36 Miss. 331, 341; *Cartwright's Case*, 114 Mass. 230, 238; *United States v. Hudson*, 7 Cranch,

32; *Anderson v. Dunn*, 6 Wheat. 204; *Ex parte Robinson*, 19 Wall. 505; *Mugler v. Kansas*, 123 U. S. 623, 672; *Ex parte Terry*, 128 U. S. 289; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 36; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

The charge of a deliberate and intentional violation of a writ of injunction, duly served, is a grave one. It is within the power of the court to punish a party found guilty of such an offense with imprisonment; a circumstance that does not diminish the gravity of the charge. The rule which requires notice to the party charged, of proceedings which may result in such serious consequences, is salutary, and will not be relaxed in the courts of the United States. The notice of the motion to stand committed should inform the party to be proceeded against, of the time and place when and where the motion will be made. The motion is made upon affidavit of the service of the injunction, and the affidavit should be served on the defendant, with the notice of the motion. This, although in the nature of a criminal proceeding, is not in fact strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not necessarily by the counsel for the government. The object of the proceeding is to enforce obedience to the process of the court, by punishing an intentional disregard of it. The mode is summary and rigorous, and the party who thus invokes the aid and powers of the court should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow; he must show the allowance of the injunction, notice of it to the defendant, its violation by him, and notice of the time and place of the motion to stand committed.¹

¹Gray v. Chicago, L. & N. R. Co., Woolw. 63, Fed. Cas. 5,713 (opinion by Justice Miller); Worcester v. Truman, 1 McLean, 483, Fed. Cas. 18,043 (opinion by Justice McLean); Eden on Injunc. 56; Augerstein v. Hunt, 6 Ves. 488; Schoonmaker v. Gillett, 3 Johns. Ch. 312; 1, Smith's Ch. Prac. 623.

Where notice of motion to stand committed has been served, and the defendant fails to appear, an attachment may be issued to bring him into court to answer the contempt. Schoonmaker v. Gillett, 3 Johns. Ch. 311.

CHAPTER XXI.

WRIT NE EXEAT REGNO.

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| <p>§ 572. Nature and purposes of the writ.</p> <p>573. Procedure in the English chancery to obtain the writ.</p> <p>574. The form of the writ <i>ne exeat regno</i>.</p> <p>575. Discharge of the writ.</p> | <p>§ 576. Writ <i>ne exeat</i> issued by federal courts and judges.</p> <p>577. Same — Where imprisonment for debt is abolished.</p> <p>578. Same — Bill must specially pray the writ.</p> |
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§ 572. Nature and purposes of the writ.—The writ *ne exeat regno* was originally a high prerogative writ, issued in attempts against the safety of the state, and intended by the laws for great political purposes and the safety of the country; but it afterward became the common process of the High Court of Chancery, and was used in suits in that court to obtain equitable bail, in analogy to the practice of obtaining common bail in suits at common law by the arrest of the defendant upon a *capias*. It was employed in England to prevent the defendant in a suit in chancery from going beyond the seas and withdrawing himself beyond the jurisdiction of the court, “to avoid the justice and equity of the court.” It was arrest for debt, upon an equitable demand, to obtain security for the performance of the decree of the court when it should be made and entered upon the hearing.¹ “This is called a state writ, and

¹For. Rom. 199, 200; 1 Smith’s Ch. Prac. 576, 577; 3 Daniell, 375, 376; Jackson v. Petrie, 10 Ves. 164; Flock v. Holm, 1 J. & W. 414; Amsinck v. Barclay, 8 Ves. 594; Beam. Ord. 40; Whitehouse v. Partridge, 3 Swanst. 377; Sealy v. Laird, 3 Swanst. 368; Bernal v. Marquis of Donegal, 11 Ves. 46; Leak v. Leak, 1 J & W. 605; Grant v. Grant, 3 Russ. 599; Jones v. Alephsin, 16 Ves. 470; Jones v. Sampson, 8 Ves. 593; Russel v. Ashby, 5 Ves. 96; Hannay v. McEntire, 11 Ves. 55; Pearne v. Lisle, Amb. 75; Howden v. Rogers, 1 Ves. & Beam. 129; Atkinson v. Leonard, 3 Bro. C. C. 218; Dick v. Swinton, 1 Ves. & Beam. 371; Gleason v. Bisley, Clarke Ch. 555, 556; Boehm v. Wood, 1 Turn. & R. 332; Mitchell v. Bunch, 2 Paige Ch. 617; Woodward v. Schatzell, 3 Johns. Ch. 412; Gibert v. Colt, 1 Hopk. Ch. 496; Rhodes v. Cousins, 6 Rand. 1; Lucas v. Hickman, 2 Stew. (Ala.) 11; Seymour v. Hazard, 1 Johns. Ch. 1; Brown v. Haff, 5 Paige Ch. 235; Porter v. Spencer, 2 Johns. Ch. 169; 1 Spence, 676.

therefore it was said it was to be tenderly made use of; but now it is become the common process of the court. The plaintiff, by a standing order made in my Lord Cowper's time, is to make oath of his debt, and the writ is always marked for the sum sworn in the affidavit, in words at length, and not in figures, and the plaintiff swears the defendant is going out of the kingdom, which, if he should do, the debt may be lost. The order is, till answered and further order. And it was formerly thought that, upon the party's putting in a full answer, the writ should be discharged. But of late the party hath been obliged to give security to abide the order on the hearing, before the court will discharge the writ, which security is taken by recognizance before a master, as all other securities are, and it is in the penalty of what is sworn due; and the sheriff takes bail accordingly, when he arrests the party thereon; the sum sworn due being constantly indorsed on the writ as a guide to the sheriff to take bail by."¹ In regard to this writ, Chancellor Walworth said: "In this court the writ of *ne exeat* is simply a means of obtaining equitable bail; and however liable it may be to abuse when used politically, as it formerly was in England, it is as harmless here as the ordinary process of the courts of common law usually denominated bailable writs. Although in form it prohibits the defendant from going out of the jurisdiction of the court, yet it is a matter of course to discharge the writ upon the party's giving security to answer the complainant's bill where a discovery is necessary, and to abide such order and decree as may be made in the cause, and render himself amenable to the process of the court which may be issued to enforce the performance of the decree. If this court has jurisdiction of the cause, and the defendant intends to leave the state, so that the decree against him would necessarily prove ineffectual, the complainant has a right to this equitable remedy, on producing proper evidence of that fact and of the actual existence of the equitable claim for which the suit is instituted. . . . As a general rule, this process is only issued for an equitable demand, and cannot be allowed on a mere legal claim. But where there is a concurrent jurisdiction between the court of chancery and courts of common law, as in the case of bills for an account, it may be granted, al-

¹ For. Rom. 199, 200.

though the defendant could have been arrested by process issued out of the court of law.”¹ A suit in equity against the vendee, to compel a specific performance of a contract to purchase land, has always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity; and where it was evident that the plaintiff was in a situation to give a clear and perfect title to the premises, and the defendant was wholly without excuse in refusing to complete the purchase, so that a specific performance should in the end be decreed, the plaintiff was, under the English practice, and the practice which in an early day prevailed in New York, entitled to a *ne exeat* upon furnishing the usual evidence that the defendant intended to remove beyond the jurisdiction of the state or out of the kingdom; but the plaintiff, to obtain the writ, was required to show a demand actually due at the time the writ was issued, and it was therefore necessary for him to show affirmatively, at that time, that he was able to make a clear and unincumbered title to the premises agreed to be sold.²

§ 573. Procedure in the English chancery to obtain the writ.—In order to obtain the writ, it was, according to the procedure in the High Court of Chancery of England, requisite: (1) The bill should be first filed, though it was not necessary that the writ of subpoena should have been served, nor that the writ should have been prayed for in the bill; but where it was intended to make the application immediately upon filing the bill it was usual to pray for the writ.³ (2) It was necessary to present a motion or petition to the court or chancellor, praying that the writ might issue; and the application might be made *ex parte*.⁴ (3) The application for the writ was supported by an affidavit that the defendant is greatly indebted to the plaintiff, and that he intends to go beyond the seas, to the great damage and prejudice of the plaintiff. “The plaintiff’s affidavit to ground the writ of *ne exeat regno* should state a debt, and that it is an equitable demand upon which the plaintiff cannot sue at law, and it must be positive that the

¹ Mitchell v. Bunch, 2 Paige Ch. 617, 618.

² Brown v. Haff, 5 Paige Ch. 235. 240, 241; Goodwin v. Clark, 2 Dick. 497; Boehm v. Wood, Turn. & R. 332.

³ 1 Smith’s Ch. Prac. 580; 3 Daniell, 386, 387.

⁴ 1 Smith’s Ch. Prac. 580; 3 Daniell, 388.

defendant is indebted to him in a certain sum; and is required to be as positive as in a case of legal bail, excepting when the bill is brought for an account only, then the plaintiff swearing he believes the balance in his favor would amount to so much, will entitle him to the writ. . . . The affidavit must be positive that the defendant is going abroad or to some declaration that he is; this declaration must have been made by himself, and not by a third person.”¹ (4) The application being found sufficiently supported by bill on file and affidavit, an order is made granting the writ; by ordinance of Lord Bacon, no writ *ne exeat regno* was allowed to be issued without warrant under the lord chancellor’s hand. In all cases the writ is marked for a certain sum, which is named in the order. The order being made, the writ is granted.²

§ 574. **The form of the writ *ne exeat regno*.**—The form of the writ *ne exeat regno* in the English chancery is as follows: “To our Sheriff of —, greeting: Whereas it is represented to us in our court of chancery, on the part of A. B., complainant, against C. D., defendant (amongst other things), that he, the said defendant, is greatly indebted to the said complainant, and designs quickly to go into parts beyond the seas (as by oath made in that behalf appears), which tends to the great prejudice and damage of the said complainant, therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said C. D. personally to come before you and give sufficient bail or security, in the sum of —, that he, the said C. D., will not go, or attempt to go, into parts beyond the seas, or to Scotland, without leave of said court; and, in case the said C. D. shall refuse to give such bail or security, then you are to commit him, the said C. D., to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us, in our said court of chancery, distinctly and plainly under your seal, together with this writ. Witness ourself at Westminster, the — day of — in the — year of our reign.”³ The same form, *mutatis mutandis*, is used in this country.⁴

¹ 1 Smith’s Ch. Prac. 580, 581; 3

³ 3 Daniell, 393.

Daniell, 388, 389, 390.

⁴ Griswold v. Hazard, 141 U. S. 260,

² 1 Smith’s Ch. Prac. 583, 584.

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§ 575. **Discharge of the writ.**—The defendant may have the writ of *ne exeat* discharged, as a matter of course, upon his giving the usual security to answer the plaintiff's bill and to render himself amenable to the process of the court pending the litigation and to such as may be issued to compel the performance of the final decree.¹ The giving of the usual security to the sheriff upon a *ne exeat* does not preclude the defendant from applying to the court, upon the bill only, or upon the coming in of the answer, to discharge the writ, and to have the bond given to the sheriff given up and canceled. But where the defendant, for his own convenience, has applied to the court and given the usual bond to answer the bill and render himself amenable to its process during the progress of the cause, and to abide the final decree, without asking to reserve the right of a future application to cancel the bond, the right to examine the question as to the propriety of holding him to bail originally must be considered as abandoned.² If the defendant cannot obtain such security as will satisfy the sheriff, or if he wishes to leave the state upon business or otherwise pending the suit, his proper course is to apply to the court to discharge the *ne exeat* upon his giving sufficient surety to answer the bill and to render himself amenable to the process of the court during the progress of the cause, and such as may be issued to compel a performance of the final decree.³ It is almost a matter of course to discharge the defendant from the writ, upon his entering into sufficient bond to abide the final decree of the court as to the subject-matter of the litigation, and render himself amenable to its processes.⁴ The writ will be discharged upon the payment into court, by the defendant, of the amount of money marked on the writ.⁵ The writ will be discharged upon the merits whenever it appears from the affidavits upon which it was granted, or from the bill, or the answer of defendant, that the plaintiff has no case, or that the defendant is not going abroad.⁶ The application to dis-

¹ *McNamara v. Dwyer*, 7 Paige Ch. 239, 244.

² *Jesup v. Hill*, 7 Paige Ch. 95, 96.

³ *Brayton v. Smith*, 6 Paige Ch. 489, 491; *Griswold v. Hazard*, 141 U. S. 260, 280, 281.

⁴ *Gleason v. Bisby*, Clarke's Ch. 551, 557.

⁵ *Evans v. Evans*, 1 Ves. Jun. 96; *Stewart v. Graham*, 19 Ves. 314; *Dick v. Swinton*, 1 Ves. & Beam. 373.

⁶ *Leo v. Lambert*, 3 Russ. 417.

charge the writ may be made by motion or petition upon notice; and the application should pray not only for the discharge of the writ, but also for the delivery up and cancellation of the bond.¹ If the sheriff takes the defendant, he must give sufficient bail in the amount mentioned in the writ. If the defendant's objection to the *ne exeat* is for an irregularity in the order, or in the process, or in the frame of the bill, there can be no doubt of his being allowed to move to discharge it without answering, but it is conceived that he cannot move on the merits until he has answered.²

§ 576. Writ *ne exeat* issued by federal courts and judges.—

A federal statute provides that: "Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."³

§ 577. Same—Where imprisonment for debt is abolished.—

The writ *ne exeat regno* was not issued where the defendant was not liable to arrest and imprisonment for debt;⁴ and the general disuse of arrest and imprisonment for debt would seem to render the writ *ne exeat regno* of little practical utility. A federal statute provides that: "No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such states."⁵

¹ Daniell, 396.

² 1 Smith's Ch. Prac. 584.

³ U. S. R. S., sec. 717.

⁴ *Ante*, § 572; Gardner v. —, 15 Ves. 444.

⁵ U. S. R. S., sec. 990.

§ 578. **Same — Bill must specially pray for the writ.**—An equity rule provides that: “The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.”¹

¹ Equity Rule 21.

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